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85-5815

Supreme Court, U.S.
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APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

No._____

AUBREY DENNIS ADAMS, Petitioner,

v.

LOUIS L. WAINWRIGHT
and JIM SMITH, Respondents

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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2364

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APPENDIX

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to furnish evidence merely tending to prove guilt, nor to prove a mere probability of guilt, et cetera, and it's that page and the next page, which is the one that ends by saying: In other words, you have no right to go outside the evidence for doubts of any kind; however, a lack of evidence or an insufficiency of evidence may create a reasonable doubt. That instruction is given at the request of the Defense and is being concurred -- and the State is agreeing that that instruction can be given in lieu of the standard Jury instruction under the Second Edition. Is that correct, Mr. Black?

MR. BLACK: Yes, sir.

THE COURT: Mr. Gill?

MR. GILL: Yes, Your Honor.

(Thereupon the following proceedings were held within the hearing of the spectators and other present in the Courtroom):

THE COURT: All right; if you will bring the Jury in, please, Mr. Bailiff.

(Thereupon the Bailiff escorted the members of the Jury into the Courtroom at 11:35 A. M., after which the following proceedings were held in the presence of the members of the Jury):

THE COURT: Ladies and gentlemen of the Jury,

you have listened carefully to the evidence and the argument of Counsel. I now ask of you the same careful attention to the law, as determined by the Court, which you must apply to the facts as you find them from the evidence.

You alone, as Jurors sworn to try this cause, must pass on the issues of fact, and your verdict must be based solely on the evidence or the lack of evidence and the law as it is given to you by the Court.

The Defendant, Aubrey Dennis Adams, Jr., is charged with the crime of first degree murder in that on January the 23rd, 1978, in Marion County, Florida, he did unlawfully, from a premeditated design to effect the death of Trisa Gail Thornley, or any human being, did kill and murder Trisa Gail Thornley, a human being, by strangling the said Trisa Gail Thornley, in violation of Florida Statute 782.04.

The charge of premeditated murder includes the lesser charges of: One, second degree murder; two, third degree murder; and, three, manslaughter.

The Defendant has entered his plea of not guilty. The effect of this plea is to require the State to prove each material allegation of the

Indictment beyond and to the exclusion of every reasonable doubt before the Defendant may be found guilty.

The killing of one human being by another is called homicide. Every homicide falls within one of these four classes: One, justifiable homicide; two, excusable homicide; three, murder in the first, second or third degree; and, four, manslaughter.

The circumstances of each case determine whether a homicide is justifiable, excusable, murder or manslaughter.

Justifiable homicide and excusable homicide are lawful. Murder and manslaughter are unlawful and constitute violations of the criminal laws.

The essential elements of an unlawful homicide, together with other matters that must be proved beyond and to the exclusion of every reasonable doubt before there can be a conviction in this case, are as follows: One, Trisa Gail Thornley is, in fact, dead; two, such death was caused by the criminal act or agency of another; and, three, the death was caused by the Defendant, Aubrey Dennis Adams, Jr.

These four classes of homicide must now be defined to you so that you can properly understand

them.

The first class that I made reference to: The killing of a human being is justifiable homicide and lawful when committed by any person in the use of such force as he reasonably believes is necessary to prevent imminent death or great bodily harm to himself or another.

The second class: Excusable homicide is homicide which is committed by accident and misfortune in doing any lawful act by lawful means with usual, ordinary caution and without any unlawful intent, or by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner.

Homicide is excusable and lawful if it is committed by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner, but if such killing is done by the use of a dangerous weapon or in a cruel or unusual manner, it is manslaughter.

A sudden and sufficient provocation is something

which would naturally and instantly produce in the mind of an ordinary person the highest degree of anger, rage, resentment or exasperation.

The heat of passion is anger, rage, resentment or exasperation so intent -- so intense as to overcome or suspend the use of ordinary judgment and to render the mind of an ordinary person incapable of calm reflection.

A dangerous weapon is any weapon which, taking into account the manner in which it is used, is likely to produce death or great bodily harm.

The third class: Murder in the first degree, is the unlawful killing of a human being when perpetrated from a premediated design to effect the death of the person killed or any human being.

A premeditated design to kill is a fully-formed conscious purpose to take human life, formed upon reflection and present in the mind at the time of the killing. The law does not fix the exact time which must pass between the formation of the intent to kill and the carrying out of that intent. It may be only a short time and yet make the killing premeditated, if the fixed intent to kill was formed long enough before the actual killing to permit some reflection on the part of

the person forming it, and that person was at the time of carrying out that intent fully conscious of a settled and fixed purpose to kill and of the results which would follow such killing. When such state of mind exists, there is a premeditated design to kill, although the killing follows closely upon the formation of the intent.

The question of premeditated design is a question of fact to be determined by the Jury from the evidence, like every other material fact in this case. The law does not require that a premeditated design be proved only by direct and positive testimony. The existence of a premeditated design, as well as its formation, are operations of the mind, as to which direct and positive testimony cannot always be obtained. Therefore, the law recognizes that it may be proved by circumstantial evidence. It will be sufficient proof of such premeditated design if the circumstances attending the homicide and the conduct of the accused convince you beyond a reasonable doubt of the existence of such premeditated design at the time of the homicide.

If a person has a premeditated design to kill one person and in attempting to kill that person

actually kills another whom he did not intend to kill, he is nonetheless guilty of murder in the first degree.

The killing of a human being in committing, or in attempting to commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping is murder in the first degree, even though there is no premediated design or intent to kill.

If a person kills another while he is trying to do or commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping, or while escaping from the immediate scene of such crime, the killing is in the perpetration of or in the attempt to perpetrate such arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping and is murder in the first degree.

The punishment provided by law for murder in the first degree is life imprisonment or death, as may be determined by the Court at a later proceeding.

Murder in the second degree is the killing of a human being by the perpetration of an act imminently dangerous to another and evincing a

depraved mind, regardless of human life, although without a premeditated design to effect the death of any particular individual.

An act is one imminently dangerous to another and evincing a depraved mind, regardless of human life, if it is an act, or a series of acts, which do the following: One, a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another; two, is done from ill-will, hatred, spite or an evil intent; and, three, is of such a nature that the act itself indicated an indifference to human life.

The punishment provided by law for murder in the second degree is imprisonment in the State Prison for life, or for such term of years as may be determined by the Court.

Murder in the third degree is the unlawful killing of a human being when perpetrated without any design to effect death by a person engaged in the commission of any felony other than arson, rape, robbery, burglary, the abominable and detestable crime against nature or kidnapping.

A felony is a crime punishable by death or imprisonment in the State Penitentiary.

A person is engaged in the commission of a

felony when doing an act which is a part of the felony, or necessary to the completion of the course of action constituting the felony, or while escaping from the immediate scene of the felony.

The punishment provided by law for murder in the third degree is imprisonment in the State Prison for a term of years to be fixed by the Court, but not exceeding fifteen years.

Fourth class: Manslaughter is the killing of a human being by the act, procurement or culpable negligence of another, without lawful justification, in cases where such killing shall not be justifiable or excusable homicide or murder.

Culpable negligence is negligence of a gross and flagrant manner, and consists of more than a mere failure to use ordinary care. Culpable negligence is consciously doing an act or following a course of conduct which any reasonable person would know would likely result in death or great bodily injury to some other person, even though done without the intent to injure any person but with utter disregard for the safety or -- of another.

The punishment provided by law for manslaughter is imprisonment in the State Prison for not more than fifteen years.

To summarize: The essential elements of an unlawful homicide which must be proved beyond a reasonable doubt in this case before there can be a conviction of any offense are as follows: One, that Trisa Gail Thornley is, in fact, dead; two, that the killing was wrongful and by the means stated in the Indictment; three, that Trisa Gail Thornley was killed by the Defendant; and, four, that the killing was neither justifiable or excusable homicide.

If the elements are established, then it will be necessary for you to determine the degree of the unlawful homicide.

If the Defendant, in killing the deceased, acted from a premeditated design to effect the death of the deceased, or some other human being, he should be found guilty of murder in the first degree.

If the killing was not from a premeditated design to effect the death of any human being, but was in the perpetration of an act imminently dangerous to another, evincing a depraved mind, regardless of human life, the Defendant should be found guilty of murder in the second degree.

If the killing took place while the Defendant

was engaged in the commission of a felony other than arson, rape, robbery, burglary, the abominable and detestable crime against nature or kidnapping, the Defendant should be found guilty of murder in the third degree.

If the killing was by the act, procurement or culpable negligence of the Defendant and was not murder in any degree or justifiable or excusable homicide, the Defendant should be found guilty of manslaughter.

Of course, if any one of the essential elements of any unlawful homicide has not been proved beyond a reasonable doubt, the Defendant should be found not guilty.

If you find the Defendant guilty of murder in the first degree, then at a later proceeding you will render an advisory sentence to the Court recommending that the Defendant be sentenced to life or death. The Court may accept such recommendation and sentence the Defendant as recommended, or it may, under certain circumstances, reject such recommendation and sentence the Defendant to either life or death.

Ordinarily, it is not necessary for the State to prove that a crime was committed on the date

alleged in the Indictment, but in this case, by a separate pleading, the exact date has been made an issue to be tried. The burden, therefore, rests upon the State to prove byond a reasonable doubt that the crime was committed between January the 23rd, 1978, and January the 24th, 1978.

Proof that the crime was committed in Marion County need be only with reasonable certainty. It need not be proved beyond a reasonable doubt.

The Defendant in every criminal case is presumed to be innocent until his guilt is established by the evidence to the exclusion of and beyond every reasonable doubt.

Before the presumption of innocence leaves the Defendant, every material allegation of the Indictment must be proved by the evidence to the exclusion of and beyond every reasonable doubt. This presumption accompanies and abides with the Defendant as to each and every material allegation of the Indictment, through each stage of the trial, until it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt.

If any of the material allegations of the Indictment is not proved to the exclusion of and beyond every reasonable doubt, you must give the

Defendant the benefit of the doubt and find him not guilty, but if you find from the evidence that all the material allegations of the charge have been proved beyond and to the exclusion of every reasonable doubt, then you must find the Defendant guilty.

To overcome the presumption of innocence of the Defendant and establish his guilt, it is not sufficient to furnish evidence merely tending to prove guilt, not to prove a mere probability of guilt, but proof of guilt to the exclusion of and beyond every reasonable doubt is absolutely necessary.

You must carefully, impartially and conscientiously consider, compare and weigh all the evidence, and if after doing this you think that your understanding, judgment and reason are well satisfied and convinced to the extent of having a full, firm and abiding conviction that the charge has been proved to the exclusion of and beyond a reasonable doubt, it is your duty to find the Defendant guilty.

A doubt which is a mere possible doubt, a speculative, imaginary or forced doubt, is not a reasonable doubt and, for the reason that everything

relating to human affairs is open to some doubt of this kind, such a doubt must not influence the Jury to return a verdict of not guilty where there has been an abiding conviction of guilt. On the other hand, if, after carefully considering, comparing and weighing all the evidence, there is not an abiding conviction of guilt or, if, having a conviction it is one which is not stable but one which waivers and vacillates, then the charge is not proved beyond every reasonable doubt and you must find the Defendant not guilty because the doubt is reasonable.

It is to the evidence introduced upon this trial, and to it alone, that you are to look for such proof.

A doubt which is not suggested by, or does not arise from, the evidence or the lack of evidence is not a reasonable doubt and should never be considered. In other words, you have no right to go outside the evidence for doubts of any kind; however, a lack of evidence or an insufficiency of evidence may create a reasonable doubt.

You are the sole judges of the weight and sufficiency of the evidence and of the credibility of the witnesses.

You should reconcile any conflicts you find in the evidence without imputing untruthfulness to any witness. If you cannot reconcile any conflicts you find, then it is your duty to reject the evidence you find to be unworthy of belief and to accept and rely upon the evidence you find worthy of belief.

In determining the believability of any witness and the weight to be given his testimony, you may properly consider the demeanor of the witness while testifying, his frankness or lack of frankness, his intelligence, his interest, if any, in the outcome of the case, the means and opportunity he had to know the facts about which he testified, his ability to remember the matters about which he testified, and the reasonableness of his testimony, considered in the light of all the evidence in the case.

From these and all of the facts and circumstances in the evidence, you must reach your own independent conclusions and in so doing you should use the same common sense, sound judgment and reason you use in everyday life.

An expert witness is one who, by education, training or experience, has become expert in any

art, science, profession, business or calling. An expert witness is permitted to give his opinion as to matters in which he is an expert, and may also state the reasons for his opinion.

You should consider each expert opinion received in evidence and give it the weight you think it deserves, and you may reject it entirely if you find that the alleged facts upon which it is based have not been proved or that the reasons given in support of the opinion are not sound.

If it is proved that a witness at some time prior to this trial made a statement inconsistent with his present testimony, you should take into consideration such statement and the time and place at which, and conditions under which, it was made in weighing his present testimony and give such weight to his present testimony as you feel it is entitled to receive in the light of all the evidence in the case.

In every criminal proceeding, a Defendant has the absolute right to remain silent. That no time is it the duty of a Defendant to prove his innocence. From the exercise of a Defendant's right to remain silent, a Jury is not permitted to draw any inference of guilt, and a Defendant's failure to take

the stand must not be considered in any manner an admission of guilt, nor should his failure to take the witness stand influence your verdict in any manner whatsoever.

A confession voluntarily made should be given fair and unprejudiced consideration with due regard to the time and circumstances under which it was made, its harmony or inconsistency with other evidence, as well as the motives shown by the evidence to have influenced the making of the confession. You may believe any part of such a confession which you find to be true and reject those parts which you find to be untrue.

Circumstantial evidence is legal evidence and a crime may be proved by such evidence. A well-connected chain of circumstances is as conclusive in proving a crime as is positive evidence. Its value is dependent upon its conclusive nature and tendency.

Circumstantial evidence is governed by the following rules: One, the circumstances themselves must be proved beyond a reasonable doubt; two, the circumstances must be consistent with guilt and inconsistent with innocence; three, the circumstances must be of such a conclusive nature and

tendency that you are convinced beyond a reasonable doubt of the Defendant's guilt.

If the circumstances are susceptible of two reasonable constructions, one indicating guilt and the other innocence, you must accept that construction indicating innocence.

Circumstances which, standing alone, are insufficient to prove or disprove any fact may be considered by you in weighing direct and positive testimony.

You are to disregard the consequences of your verdict. You are empanelled and sworn only to find a verdict based upon the law and the evidence. You are to consider only the testimony which you have heard,along with the other evidence which has been received, and the law as given to you by this Court.

You are to lay aside any personal feelings you may have in favor of or against the State and in favor of or against the Defendant. It is only human to have personal feelings or sympathy in matters of this kind, but any such personal feelings or sympathy has no place in the consideration of your verdict.

When you have determined the guilt or innocence of the accused, you have completely fulfilled

your solemn obligation under your oaths.

Your verdict finding the Defendant either guilty or not guilty must be unanimous. The verdict must be the verdict of each Juror, as well as the Jury as a whole.

The Indictment charges the crime of first degree murder which includes, as a matter of law, the lesser included crimes of: One, second degree murder; two, third degree murder; and, three, manslaughter.

You may find the Defendant guilty as charged in the Indictment or guilty of such lesser included crimes as the evidence may justify. You may return one of these verdicts: One, not guilty; two, guilty of first degree murder as charged in the Indictment; three, guilty of second degree murder; four, guilty of third degree murder; or, five, guilty of manslaughter.

If you return a verdict of guilty, it should be for the highest offense which has been proved beyond a reasonable doubt. If you find that no offense has been proved beyond a reasonable doubt, then, of course, your verdict must be not guilty.

You are here only to determine the guilt or innocence of the Defendant. So if the evidence

convinces you beyond every reasonable doubt of the guilt of the Defendant, you should find him guilty, even though you may believe one or more other persons are also guilty.

The Defendant is not on trial for any act or conduct not charged in this Indictment, and you must consider the evidence only as it relates to this charge.

Nothing I have said in these instructions, or at any other time during the trial, is any intimation whatever as to what verdict I think you should find. The verdict is the sole and exclusive duty and solemn responsibility of you, the Jury, and neither the Court nor anyone else can help you in performing that duty.

If, after having heard all the evidence and the law as given you by the Court, you have any reasonable doubt as to the Defendant's guilt, you must find him not guilty. However, if you are satisfied beyond every reasonable doubt of his guilt, it is your duty to find him guilty of such crime as to which you are satisfied of his guilt beyond every reasonable doubt.

If, while you are deliberating, you wish to examine more closely the Exhibits which have been

admitted into evidence, you may call for them and they will be delivered to you, or viewed here in the Courtroom.

Your first duty upon retiring will be the election of a foreman or forewoman to preside over your deliberations and sign your verdict -- your verdict when you have arrived at one.

If you wish to communicate with the Court during your deliberations, please notify your Bailiff.

Let me add one other thing other than these general instructions. If you have a question that comes up that you feel must be answered by the Court, please do not ask that question of the Bailiff. He cannot answer that for you and if he should it would become reversible error. I'm going to give you a yellow pad -- Mr. Black or Mr. Gill, you have no objection to an unmarked yellow pad of any kind so that the question can be written on that?

MR. BLACK: No, sir.

MR. GILL: No, sir.

THE COURT: All right. I will have the Bailiff at the time he gives you the proposed form of the verdicts to give you this yellow

pad. If you have a question that must be answered by the Court, please write the question on this yellow pad. You will then give that question to the Bailiff. Mr. Bailiff, you are instructed to bring the question directly to me, and at that point I will notify both sets of attorneys that I have received a question. I'll ask that you come to my chambers. I'll ask the Court Reporter to come there, and we will discuss the question and decide in what manner it will be answered. Once having reached that decision, the Jury will be brought back into the Courtroom, the question read into the record and the answer given that has previously been decided upon by the Court.

Would Counsel please approach the bench. Mr. Brandies?

(Thereupon Counsel for the respective parties to the cause approached the bench and the following proceedings were held out of the hearing of the members of the Jury):

MR. GILL: Judge, I'll point out one thing. It says Inverness, Citrus County. You may want to --

THE COURT: Has the Court omitted any instruction that the Court advised Counsel in the

instruction conference that it would give in this cause?

MR. GILL: No, sir, Your Honor.

MR. BLACK: No, sir.

THE COURT: Are there any objections to the instructions as given by the Court?

MR. GILL: No, sir, Your Honor.

MR. BLACK: No, sir.

THE COURT: Okay; that will be all.

MR. GILL: One other thing, Judge. The alternate Jurors, will we keep them --

THE COURT: What I'm intending to do, I've talked with the head Bailiff of Lake County, George. I don't know what his last name is. As soon as the twelve, that is the Jury -- I will ask the two alternates to stay here. The twelve will be taken into their Jury Room. There is another Jury Room and my Bailiff has been shown where they are. He will take those two alternates into that room so that they are not in the regular Jury but where they will be isolated, and both sets of Jurors will be fed, and then I would intend to bring the alternates back at the time if and when a verdict is reached or if at any time the Jury comes back into the Courtroom those alternates

will be back in the Courtroom.

MR. BLACK: Very good.

THE COURT: I think the record should show that the Defense agree and the State has agreed to that procedure.

MR. GILL: And the State would request a copy of the Indictment go in with the evidence.

MR. BLACK: That's proper.

THE COURT: All right; do you have a copy of the original?

MR. GILL: Yes, sir.

MR. BLACK: Wait a minute; let me see the copy.

(Thereupon Mr. Black examined the instrument).

MR. BLACK: This has pencil marks on it. Can Mrs. Hoppe make a photostatic copy of the Court's original, Judge?

THE COURT: Here is the Court's original. Look at that and see if there's anything you object to.

(Thereupon Mr. Black examined the instrument).

THE COURT: How about let's just send the original in?

MR. BLACK: That will be fine.

MR. GILL: Fine.

THE COURT: Miss Clerk, if you will remove that, please.

(Thereupon the following proceedings were held within the hearing of the members of the Jury):

THE COURT: Now, with the exception of our alternates, you may retire to consider the verdict. For record purposes, and so that all of you can remember, Mrs. White, you're alternate number one and you should remain here, please, and Mr. Eldridge, you're alternate number two. You should remain here, please. Mr. Bailiff, if you will give the proposed verdict forms to the Jury, the original Indictment and the pad that's been agreed upon, which is a blank pad, and take them back into their deliberation Jury Room, please. Mr. Bailiff, after you get them seated in their room, come back into the Courtroom so I can have you do something else, please.

(Thereupon the Bailiff escorted the twelve Jurors into the Jury Room at 12:04 P. M., after which the following proceedings were held in the absence of the twelve Jurors):

THE COURT: While we're waiting on the Bailiff to come back, let the record show that the original twelve Jurors are outside the hearing of this

THE COURT: But you did argue --

MR. BLACK: -- just what you said you --

THE COURT: -- at least it was kidnapping.

MR. OLDHAM: Okay.

THE COURT: You don't object?

MR. OLDHAM: No.

THE COURT: I'm going to give Defendant's Number Nine and Defendant's Number Five, one right after the other. Where I had previously told you I was going to give Nine, I'm adding Five to it.

(Thereupon the following proceedings were held within the hearing of the members of the audience):

THE COURT: Anything further we need to take care of before I bring the Jury back in, Mr. Oldham?

MR. OLDHAM: No, Your Honor.

THE COURT: Mr. Black?

MR. BLACK: No, sir.

THE COURT: All right. Bring the Jury back in.

(Thereupon the Bailiff returned the members of the Jury to the Courtroom at 4:22 P. M., after which the following proceedings were held in the presence of the members of the Jury):

THE COURT: Ladies and gentlemen of the Jury,

it is now your duty to advise the Court as to what punishment should be imposed upon the Defendant for his crime of first degree murder. As you have been told, the final decision as to what punishment should be imposed is the responsibility of the Judge. However, it is your duty to follow the law which will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

Your verdict should be based upon the evidence which has been presented to you in these proceedings.

The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence: (A), that the crime for which the Defendant is to be sentenced was committed while the Defendant was under sentence of imprisonment; (B), that at the time of the crime for which he is to be sentenced, the Defendant had been previously convicted of another

capital offense or of a felony involving the use or threat of violence to some person; (C), that the Defendant, in committing the crime for which he is to sentenced, knowingly created a great risk of death to many persons; (D), that the crime for which the Defendant is being sentenced was committed while the Defendant was engaged in the commission of an attempt to commit or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb; (E), that the crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (F), that the crime for which the Defendant is to be sentenced was committed for pecuniary gain; (G), that the crime for which the Defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any Governmental function or the enforcement of laws; (H), that the crime for which the Defendant is to be sentenced was especially heinous, atrocious or cruel.

Heinous means extremely wicked or shockingly

evil.

Atrocious means outrageously wicked and vile.

Cruel means designed to inflict a high degree of pain, utter indifference to or enjoyment of the suffering of others; pitiless.

In considering these aggravating circumstances, you must not consider any physical change in the body of the victim after death.

Where two or more aggravating circumstances refer to the same aspect of the crime, you shall consider them as constituting only one aggravating circumstance.

If you do not find that there existed sufficient of the aggravating circumstances which have been described to you, it will be your duty to recommend a sentence to life imprisonment.

Should you find sufficient number of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist. The mitigating circumstances which you may consider, if established by the evidence, are these: (A), that the Defendant has no significant history

of prior criminal activities; (B), that the crime for which the Defendant is to be sentenced was committed while the Defendant was under the influence of extreme mental or emotional disturbance; (C), that the victim was a participant in the Defendant's conduct or consented to the act; (D), that the Defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the Defendant's participation was relatively minor; (E), that the Defendant acted under extreme duress or under the substantial domination of another person; (F), the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; (G), age of the Defendant at the time of the crime.

The aggravating circumstances which you may consider are limited to those upon which I've just instructed you. However, there is no such limitation upon the mitigating factors which you may consider.

Aggravating circumstances must be established beyond a reasonable doubt before they may be considered by you in arriving at your decision.

Proof of an aggravating circumstance beyond a reasonable doubt is evidence by which the understanding, judgment and reason of the Jury are well satisfied and convinced to the extent of having a full, firm and abiding conviction that the circumstance has been proved to the exclusion of and beyond a reasonable doubt.

Evidence tending to establish an aggravating circumstance which does not convince you beyond a reasonable doubt of the exitence of such circumstance at the time of the offense should be wholly disregarded.

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed.

The sentence which you recommend to the Court must be based upon the facts as you find them from the evidence and the law given to you by this Court. Your verdict must be based upon your finding of whether sufficient aggravating circumstances exist and whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances

found to exist.

In determining whether to recommend life imprisonment or death, the procedure you are to follow is not a mere counting process of "x" number of aggravating circumstances and "y" number of mitigating circumstances, but rather you are to exercise a reasoned judgment as to what factual situations require the imposition of death and which situations can be satisfied by life imprisonment in light of the totality of the circumstances present.

Based on these considerations, you should advise the Court whether the Defendant should be sentenced to life imprisonment or to death.

In these proceedings, it is not necessary that the verdict of the Jury be unanimous but a verdict may be rendered upon the finding of a majority of the Jury.

The fact that the determination of whether or not a majority of you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider

the evidence, and all of it, realizing that human life is at stake, and bring to your bear your best judgment upon the sole issue which is submitted to you at this time: Whether a majority of your number recommend that the Defendant be sentenced to death or to life imprisonment.

Should a majority of the Jury determine that the Defendant should be sentenced to death, you should recommend an advisory sentence as follows: "A majority of the Jury advise and recommend to the Court that it impose the death penalty upon the Defendant, Aubrey Dennis Adams, Jr."

On the other hand, if, after considering all the law and the evidence touching upon the issue of punishment, a majority of the Jury determine that the Defendant should not be sentenced to death, then you should render an advisory sentence as follows: "A majority of the Jury advise and recommend to the Court that it impose a sentence of life imprisonment upon the Defendant, Aubrey Dennis Adams, Jr."

The law requires that seven or more members of the Jury agree upon any recommendation advising either the death penalty or life imprisonment. You will now retire to consider your recommendation,

and when seven or more are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your foreman and returned into Court.

Who are the two alternates? Is it Mrs. White and Mr. Eldridge? So that there is no disagreement, the two alternates are Mr. Eldridge and Mrs. White. Both the State and Defense agree to that?

MR. OLDHAM: Yes, Your Honor.

MR. BLACK: Yes, sir.

THE COURT: All right. Except for Mr. Eldridge and Mrs. White, when the Bailiff hands you these verdicts y'all may go back into the Jury Room. The two alternate Jurors are to remain here. You may take the Jury back.

(Thereupon the Bailiff escorted the twelve members of the Jury into the Jury Room at 4:31 P.M., after which the following proceedings were held in the presence of the two alternate Jurors):

THE COURT: All right. Mr. Eldridge and Mrs. White, you are dismissed from your subpoena and will not have to sit further. I again want to thank you. Yours has been a very trying job. I realize and I hope you do as to the importance that you have played in this case. Had we needed

have -- do you care to be heard?

THE DEFENDANT: No, sir.

THE COURT: This cause coming on to be considered pursuant to the provisions of Section 921.141, Florida Statutes, after (A), the conviction of the Defendant, Aubrey Dennis Adams, Jr., of murder in the first degree, by a duly impanelled Jury and, (B), the rendition by such Jury at the conclusion of the sentencing proceeding of an advisory sentence recommending the imposition of the death sentence, and after carefully considering and weighing the evidence presented during such trial and sentencing proceeding, the arguments of the attorneys as to the sentence to be imposed, and the presentence investigation report submitted by the Florida Parole Commission, the undersigned concludes and determines:

One, That the State proved beyond and to the exclusion of a reasonable doubt the following aggravating circumstances, to-wit:

(a) The capital felony was committed while the Defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnapping,

aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb,

(b) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody,

(c) The capital felony was especially heinous, atrocious or cruel,

And the State failed to prove beyond and to the exclusion of a reasonable doubt the following aggravating circumstances, to-wit:

(a) The capital felony was committed by a person under sentence of imprisonment,

(b) The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person,

(c) The Defendant knowingly created a great risk of death to many persons,

(d) The capital felony was committed for pecuniary gain,

(e) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

That the Defendant, Aubrey Dennis Adams, Jr., established the following mitigating circumstances,

to-wit:

(a) The Defendant has no significant history of prior criminal activity,

(b) The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance,

(c) The age of the Defendant at the time of the crime,

And that the Defendant failed to establish by evidence any other mitigating circumstances, including, but not limited to 921.141(7), c, d, e, f, Florida Statutes.

FURTHER FINDINGS OF FACT: That the capital felony was committed while the Defendant was engaged in or attempting to engage in or in the flight after committing kidnapping is proven beyond and to the exclusion of a reasonable doubt by Defendant Adams' admission, State's Exhibit Number 49, in which he says: After getting off from work as a prison guard at Lowell Prison, he went to check his mail at his old residence, which is approximately two blocks from the residence of the victim, Trisa Gail Thornley, age eight, and saw her walking home from school about one and a half blocks from her home. He knew the

victim and offered to give her a ride home. She got into Defendant's car and he started towards her home, then turned away towards the Pine Street Shopping Center; then out State Road 200 towards the Central Florida Community College. He remembered being stopped somewhere when she started screaming and he put his hand over her mouth and she stopped breathing.

The above fact of kidnapping is also supported by the testimony at the trial of the Defendant by police officers S. H. Stephenson, John E. Fluno and W. R. Fugitt regarding the written statements made by the Defendant and the oral statements concerning her death and her disappearance that he gave the three officers.

Kidnapping is also evidenced by the testimony of Trisa Gail Thornley's third grade school teacher, Carolyn Andrews, who observed the victim leave school at approximately 2:20 P. M. on January 23, 1978, and by Trisa Gail Thornley's aunt and uncle, Lawson and Theresa Hopper, and the victim's sister, Tracy Thornley, who stated that the victim, Trisa Gail Thornley, did not return home from school that day as she usually did.

For additional support that 921.141(6) (d),

Florida Statutes, is proved beyond and to the exclusion of a reasonable doubt is the evidence proving that the capital felony was committed while the Defendant was engaged in or attempting to engage in or flight after committing rape is proven beyond and to the exclusion of a reasonable doubt by the testimony of Officer Stephenson who was present at the Defendant's interview, who stated that Defendant Adams said that he thought he tried to but couldn't do it, or couldn't bring himself to do it, and that her body was found nude with her hands taped behind her back, such tape applied to the victim, by sworn testimony of pathologist, Dr. Gertrude Warner, of Ocala, Florida, as being applied around the wrists while the victim, Trisa Gail Thornley, was still alive.

That the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody is proven beyond and to the exclusion of a reasonable doubt by the facts stated above proving kidnapping and rape by the additional fact that Trisa Gail Thornley was found dead on March 15th, 1978, which prevented any testimony on her part concerning kidnapping and rape some seven weeks after her

disappearance while walking home from school.

That the capital felony was especially heinous, atrocious or cruel is proven beyond and to the exclusion of a reasonable doubt by expert medical testimony that the autopsy, performed by Drs. Gertrude Warner and William Shutze, showed a bruise on one arm, inflicted prior to death, that the autopsy showed swelling in the hands induced by tight binding with tape prior to death, State's Exhibit Number 17, that the autopsy showed that the body was a nude body of an eight year old girl whose hands were tightly taped behind her back prior to death, which showed that Trisa Gail Thornley had time to anticipate her murder and that the autopsy and photographs showed seven coils of rope with a circumference of nine and three-fourths inches around the neck of Trisa Gail Thornley, as shown in evidence by State's Exhibit Number 16, and that the child's body was placed in a plastic garbage bag and thrown in a wooded area some three miles from her home.

Based exclusively and only upon, (1), the records and the evidence properly introduced and admitted during the trial, sentencing proceedings and presentence investigation and, (2), the

sufficient aggravating circumstances set forth above and finding that three mitigating circumstances, the fact that the Defendant was only twenty years of age at the time of the crime and that the Defendant was under the influence of extreme mental or emotional disturbance, in that the Defendant and his wife were getting a divorce and, (3), that the Defendant had no significant prior criminal activity are insufficient to outweigh the aggravating circumstances, the undersigned accepts and agrees with the advisory sentence by the Jury recommending that the death sentence should be imposed on the Defendant, Aubrey Dennis Adams, Jr.

The Defendant, Aubrey Dennis Adams, Jr., being personally before this Court, represented by his Counsel, Reginald Black and Frederick Landt, his attorneys of record, heretofore entered his plea of not guilty to the charge of muder in the first degree as defined by Section 782.04, as amended, of the Florida Statutes, and thereupon said Defendant was duly tried by a Jury, with his attorneys representing him at such trial, and the Jury having brought in its verdict finding the Defendant, Aubrey Dennis Adams, Jr., guilty

of murder in the first degree, and the Court having inquired and given the Defendant an opportunity to be heard and show cause why he sould not be adjudged guilty and sentenced as provided by law, including an opportunity to offer matters in mitigation of sentence, and no cause being shown, it is thereupon ORDERED AND ADJUDGED that the Defendant, Aubrey Dennis Adams, Jr., is hereby adjudicated guilty of the crime of murder in the first degree, 782.04, as amended, of the Florida Statutes, and the Jury rendered its advisory sentence that the Defendant receive the death sentence, and the Court having adjudicated said Defendant guilty of said offense and filed its finding of fact herein, and the Defendant being asked by the Court whether he had anything to say why sentence of the law should not now be pronounced upon him, and saying nothing to preclude such sentence, it is therefore,

The judgment, order and sentence of the Court that the Defendant, Aubrey Dennis Adams, Jr., for the crime in which he has been convicted of, to-wit: Murder in the first degree, be electrocuted till he be dead in the manner as described and directed by the laws of the State of Florida.

It is further ordered that the Defendant, Aubrey Dennis Adams, Jr., be committed to the custody of the Department of Offender Rehabilitation and be imprisoned until he be electrocuted till he be dead in the manner directed by the laws of the State of Florida.

It is further ordered that the Sheriff of Marion County is hereby ordered and directed to deliver said Defendant, Aubrey Dennis Adams, Jr., to the Department of Offender Rehabilitation together with a copy of this judgment and sentence.

It is further ordered and directed that the Defendant, Aubrey Dennis Adams, Jr., shall pay the sum of one dollar pursuant to Section 943.25, Florida Statutes.

Mr. Adams, you are hereby advised that you have the right to appeal the judgment and sentence of this Court if you so desire. You have thirty days from this date within which to file your Notice of Appeal, that if you fail to do so your right to appeal has been waived. You are further advised that you have the right to have an attorney represent you in prosecuting said appeal and that if you cannot afford one the Court will appoint one for you at no expense to you upon your request.

The Defendant in open Court was advised of his right to appeal from this judgment and sentence within thirty days from this date, and the Defendant's entitlement of the assistance of Counsel in taking said appeal upon a showing that said Defendant was entitled to an attorney at the expense of the State.

Done and ordered in open Court in Ocala, Marion County, Florida, this the 16th day of January, 1979.

Fingerprint the Defendant.

(Thereupon the Defendant, Aubrey Dennis Adams, Jr., submitted himself for the taking of fingerprints, after which time the Bailiff escorted the Defendant from the Courtroom at 1:55 P. M., after which the following proceedings were held):

THE COURT: Mr. Black, I believe there are two other Motions that we need to dispose of.

MR. BLACK: Yes, sir, Judge. Actually, there's one Motion containing two subject matters. The Court previously, as you see in the record, declared Mr. Adams to be indigent for purposes of investigative costs and witness subpoenas and that sort of thing. I'd like to file now with

Aubrey Dennis ADAMS, Jr., Appellant,

v.

STATE of Florida, Appellee.

No. 56134.

Supreme Court of Florida.

Feb. 11, 1982.

Rehearing Denied May 5, 1982.

The Circuit Court, Marion County, W. F. Edwards, J., convicted defendant of murder in the first degree, and defendant appealed. The Supreme Court, Adkins, J., held that: (1) although erroneous or uninvited felony-murder instruction was given, evidence of premeditation was sufficient to render error harmless, (2) trial court did not err in admitting into evidence color photograph taken at scene where body was discovered and other photograph of body showing victim's hands taped together with adhesive tape; and (3) sentence of death was appropriate.

Affirmed.

Boyd, J., concurred in part and dissented in part with an opinion.

McDonald, J., concurred as to the conviction and dissented as to the sentence.

1. Homicide ⇐18(1)

Where indictment alleged that defendant murdered victim, unlawfully from premeditated design by strangling, State could prosecute under both theory of premeditation and theory of felony-murder.

2. Homicide ⇐236(1)

Evidence was sufficient to sustain finding that death was caused by strangulation, not by defendant placing his hand over mouth of victim so as to keep her from screaming or yelling.

3. Homicide ⇐340(1)

Although erroneous or uninvited felony-murder instruction was given, evidence of premeditation was sufficient to render erroneous instruction harmless, and thus reversal of conviction of murder in the first degree was not warranted.

4. Criminal Law ⇐1038.2, 1038.3

Request for an instruction or an objection over a failure to give an instruction is a prerequisite to raising an alleged error on appeal.

5. Criminal Law ⇐438(7)

If photograph is relevant to issue required to be proven in a case, fact that evidence is gruesome and offensive does not bar admissibility.

6. Criminal Law ⇐438(6)

In murder prosecution, color photograph taken at scene where body was discovered was relevant to show crime scene and premeditation and was admissible.

7. Criminal Law ⇐438(6)

Photograph, apparently taken somewhere other than at scene where victim's body was discovered, showing tying of hands and tape on victim's hands, was relevant to show premeditation and circumstances of death and was admissible.

8. Homicide ⇐354

Imposition of death sentence upon conviction of first-degree murder of eight-year-old girl, was proper, in view of evidence that capital felony was committed while defendant was engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit a rape or kidnapping, and in view of evidence indicating that killing was heinous, atrocious, and cruel. West's F.S.A. § 921.141(5)(d).

9. Homicide ⇐235

In sentencing phase of first-degree murder trial, there was sufficient competent evidence from which judge could properly have found that capital felony was committed while defendant was engaged in the commission of, or in attempt to commit, or flight after committing or attempting to commit, a rape or kidnapping. West's F.S.A. § 921.141(5)(d).

10. Homicide ⇐354

Trial judge did not err in finding that defendant's acts constituted an aggravating factor for purposes of determining whether to impose death sentence, despite contention that there was no crime of rape in Florida since rape statute was repealed and nomenclature of offense was changed to "sexual battery" or "attempt to commit sexual battery." West's F.S.A. §§ 794.011, 921.141(5)(d).

11. Constitutional Law ⇐258(1)

Due process requires only that law give sufficient notice so that men may conform their conduct so as to avoid that which is forbidden. U.S.C.A.Const.Amend. 14.

12. Homicide ⇐354

There was sufficient competent evidence from which judge could have found that defendant committed capital felony in an effort to avoid or prevent a lawful arrest, in view of evidence that victim knew and could have identified defendant, that he encased body in white plastic garbage bags and tied it with rope, that he disposed of body in a desolate area, and that he concealed his crime effectively for period of time from January 22, 1978 to March 15, 1978. West's F.S.A. § 921.141(5)(e).

13. Homicide ⇐354

Fear and emotional strain preceding victim's almost instantaneous death may be considered as contributing to the heinous nature of a capital felony.

14. Homicide ⇐354

In view of defendant's statement indicating that eight-year-old victim was screaming prior to her strangulation by defendant, an adult, there was sufficient competent evidence in the record from which trial judge could have found that, for purposes of determining whether to impose death penalty, the murder was heinous, atrocious, and cruel.

15. Homicide ⇐354

For purposes of determining whether death sentence was appropriate, trial court did not err in failing to find that capacity of defendant to conform his conduct to requirements of law was substantially impaired as a result of his marital distress.

Jim Smith, Atty. Gen., and David P. Gauldin, Asst. Atty. Gen., Tallahassee, for appellee.

Michael M. Corin, Asst. Public Defender, Second Judicial Circuit, Tallahassee, for appellant.

ADKINS, Justice.

This is a direct appeal from a judgment adjudging defendant guilty of murder in the first degree and sentence of death.

The victim, eight years of age, left school on January 23, 1978, at about 2:30 P.M. Her body was found on March 15, 1978, in a wooded area near Ocala, Florida, by three men who were gopher hunting. The defendant's involvement in the disappearance and death of the victim was shown through circumstantial evidence and by statements, both written and oral, made by him to officers of the Ocala police department.

In his written statements, the defendant stated that he saw the victim walking home from school about a block and a half from her house and offered to give her a ride home. She got in the car and defendant drove away with her. The defendant remembered "being stopped somewhere and she was screaming and I put my hand over her mouth", and she quit breathing. In his oral statement the defendant said he had removed the clothes from the victim and used some cord which he carried in his car to tie her up so that she would fit into plastic bags. He also said that he tried to have sexual relations with her, but couldn't bring himself to do it. He denied having sexual relations with her.

Two expert witnesses testified that the cause of death was strangulation, but one of the experts stated that the child could have died from manual suffocation. One expert rendered an opinion that the victim's wrists had been taped prior to death. The defendant, in his oral statement, said that he had removed the victim's clothes, but

there was an indication from this statement that the clothes were removed after she quit breathing. However, the state argues that as a matter of logic, the clothes were removed prior to the time the wrists were bound, and, at that time, the victim was still alive.

The jury found the defendant guilty of murder in the first degree, and, after hearing evidence in the penalty phase of the trial, recommended that the defendant be sentenced to death.

The defendant argues that the trial court committed reversible error in failing to instruct the jury on the elements of the underlying felonies of sexual battery and kidnapping. The instructions of the court contained the following:

> The killing of a human being in committing, or in attempting to commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping is murder in the first degree, even though there is no premeditated design or intent to kill.
>
> If a person kills another while he is trying to do or commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping, or while escaping from the immediate scene of such crime the killing is in the perpetration of or in the attempt to perpetrate such arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping and is murder in the first degree.

Defendant correctly points out that the instruction included references to two crimes which do not exist, to wit: rape and an abominable and detestable crime against nature. Defendant argues that it is an indispensable requisite to a fair trial to instruct the jury on all essential elements of a crime, but the jury was not instructed on the essential elements of sexual battery and kidnapping, the only possible applicable felonies with which the state could have sought a conviction for felony murder. He relies on *Robles v. State*, 188 So.2d 789 (Fla.1966).

[1] The indictment alleged that defendant murdered the victim, unlawfully, from a premeditated design by strangling. Under this charge, the state could prosecute under both a theory of premeditation and a theory of felony-murder. *Barton v. State*, 193 So.2d 618 (Fla.2d DCA 1966), *cert. denied*, 201 So.2d 459 (1967).

[2] The record shows that defendant had visited in the home of the victim and she voluntarily accompanied defendant during the fatal ride. The evidence is sufficient to sustain a finding that the death was caused by strangulation, not by the defendant placing his hand over the mouth of the victim so as to keep her from screaming or yelling. Her hands were tied and taped behind her head, and a rope was around her neck. "Premeditation, like other factual circumstances, may be established by circumstantial evidence." *Larry v. State*, 104 So.2d 352, 354 (Fla.1958).

The final argument of the state was geared toward the single question of whether or not the evidence was sufficient to show a premeditated design on the part of defendant to murder the victim.

In *Knight v. State of Florida*, 394 So.2d 997, 1002 (Fla.1981), we considered that question:

> The first issue concerns the trial judge's failure to instruct the jury on the elements of the underlying felony. The petitioner contends that our decision in *Robles v. State*, 188 So.2d 789 (Fla.1966), is determinative and that a trial court's failure to give an adequate instruction on the underlying felony is a fatal error even when such instruction has not been requested by the defendant. Subsequent to our opinion on the initial appeal in this cause, we decided *State v. Jones*, 377 So.2d 1163 (Fla.1979), which reaffirmed our decision in *Robles v. State*.
>
> The record in the instant case reflects that the trial judge gave the general definitive instructions for homicide but did not specifically instruct upon the elements of the underlying felony of kidnapping or robbery. There was no request or objection by petitioner's trial counsel to this failure to give these instructions.

It is clear that in both *Robles* and *Jones* the primary charge was felony murder and the state in neither case contended the evidence was sufficient to establish premeditated murder. We expressly noted in *Jones* that there was no contention that there was sufficient evidence to establish premeditated murder. We conclude that where there is sufficient evidence of premeditation, the failure to give the underlying felony instruction, where it has not been requested, is not error which mandates a reversal absent a showing of prejudice. *See Frazier v. State*, 107 So.2d 16 (Fla.1958).

. . . .

[T]he record in this cause, and in particular the final argument of counsel, demonstrates that the state, although it mentioned felony murder, strongly argued premeditated murder to the jury. The record reflects that there is not only sufficient but overwhelming evidence of premeditated murder. We find that under the circumstances of this case and our review of the record that neither *Robles* nor *Jones* applies, but *Frazier* does apply. We are satisfied beyond a reasonable doubt that the failure to give the instruction at issue was not prejudicial and did not contribute to the petitioner's conviction. *See Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

See also McKennon v. State, 403 So.2d 389 (Fla.1981).

[3] Although an erroneous or uninvited felony murder instruction was given, the evidence of premeditation was sufficient to render the erroneous instruction harmless.

[4] Of course, it may have been defendant's counsel's strategy to avoid, at all costs, any unnecessary reference to the underlying felonies committed by the defendant during the perpetration of the murder. Perhaps that explains his failure to make any objection to the instruction. Request for an instruction or an objection to a failure to give an instruction is a prerequisite to raising an alleged error on appeal. *Alford v. State*, 280 So.2d 479 (Fla. 3d DCA), *cert. denied*, 284 So.2d 218 (1973); *Flagler v. State*, 198 So.2d 313 (Fla.1967).

[5–7] Defendant says that the trial court committed reversible error in admitting into evidence, over defendant's objection, two photographs of the victim. One photograph in color, was taken at the scene where the body was discovered. The other photograph, apparently taken somewhere else, is of the body and shows the victim's hands taped together with adhesive tape. The guidelines to be followed in determining the admissibility of photographic evidence were set forth by this Court in *State v. Wright*, 265 So.2d 361, 362 (Fla.1972), as follows:

> [T]he current position of this Court is that allegedly gruesome and inflammatory photographs are admissible into evidence if relevant to any issue required to be proven in a case. Relevancy is to be determined in the normal manner, that is, without regard to any special characterization of the proffered evidence. Under this conception, the issues of "whether cumulative", or "whether photographed away from the scene," are routine issues basic to a determination of relevancy, and not issues arising from any "exceptional nature" of the proffered evidence.

If the photograph meets the guidelines set forth above, the fact that the evidence is gruesome and offensive does not bar the admissibility. *Foster v. State*, 369 So.2d 928 (Fla.), *cert. denied*, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979). This is consistent with the reasoning in *Mardorff v. State*, 143 Fla. 64, 196 So. 625, 626 (1940), where the Court said:

> Counsel contends that the pictures tended "to inflame the minds of the jury to a state of passion" and to "prejudice them against" the defendant rendering the evidence inadmissible. That this proof was prejudicial to the defendant there can be no doubt, but, as was so aptly stated in Wharton's Criminal Evidence, 11th Ed., Sec. 773, p. 1321:
>
> "Where they are otherwise properly admitted, it is not a valid objection to the admissibility of photographs that they

tend to prejudice the jury. Competent and material evidence should not be excluded merely because it may have a tendency to cause an influence beyond the strict limits for which it is admissible."

In *Lindberg v. State*, 134 Fla. 786, 184 So. 662, we quoted the above authority and approved exhibition to the jury of a picture showing the body of the murder victim.

The colored photograph was relevant to show the crime scene and premeditation. The other photograph, showing the tying of the hands and the tape on the victim's hands, was relevant to show premeditation and the circumstances of death.

At trial the state sought to introduce two other photographs which were excluded by the trial judge upon the objection of the defendant. The trial judge exercised reasoned judgment and prohibited the introduction of duplicitous photographs. *See Alford v. State*, 307 So.2d 433 (Fla.1975), *cert. denied*, 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). The trial court did not commit error in admitting these photographs into evidence.

[8] We now turn to the propriety of the death sentence. The trial court found three aggravating circumstances: 1) that the capital felony was committed while defendant was engaged in or attempting to engage in, or in the flight after committing or attempting to commit rape and/or kidnapping; 2) that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; 3) that the capital felony was especially heinous, atrocious, or cruel.

The trial judge found three mitigating circumstances: 1) that the defendant had no significant history of prior criminal activity; 2) that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; 3) that the defendant's age (20) was of significance.

[9] The jury recommended death and the trial judge concurred in that recommendation.

In support of his finding of fact that the capital felony was committed while the defendant was engaged in or attempting to commit or flight after committing or attempting to commit a rape or kidnapping (Fla.Stat. § 921.141(5)(d)), the judge stated:

That the capital felony was committed while the Defendant was engaged in or attempting to engage in or in the flight after committing *kidnapping*, is proven beyond and to the exclusion of a reasonable doubt by Defendant Adams' admission, States Exhibit # 49, in which he says:

After getting off from work as a prison guard at Lowell Prison, he went to check his mail at his old residence, which is approximately two blocks from the residence of the victim, Trisa Gail Thornley, age 8, and saw her walking home from school about one and a half blocks from her home. He knew the victim and offered to give her a ride home. She got into Defendant's car and he started towards her home, then turned away towards the Pine Street Shopping Center; then out State Road 200 towards the Central Florida Community College. He remembered being stopped somewhere when she started screaming and he put his hand over her mouth and she stopped breathing.

The above fact of kidnapping is also supported by the testimony at the trial of the Defendant by police officers S. H. Stephenson, John E. Fluno and W. R. Fugitt regarding the written statements made by the Defendant and the oral statements concerning her death and her disappearance that he gave the three officers.

Kidnapping is also evidenced by the testimony of Trisa Gail Thornley's third grade school teacher, Carolyn Andrews, who observed the victim leave school at approximately 2:20 P.M. on January 23, 1978, and by Trisa Gail Thornley's aunt and uncle, Lawson and Theresa Hopper, and the victim's sister, Tracy Thornley, who stated that the victim, Trisa Gail

Thornley, did not return home from school that day as she usually did.

For additional support that 921.141(6) [sic] (d), Florida Statutes, is proved beyond and to the exclusion of a reasonable doubt is the evidence proving that the capital felony was committed while the Defendant was engaged in or attempting to engage in or flight after committing rape is proven beyond and to the exclusion of a reasonable doubt by the testimony of Officer Stephenson who was present at the Defendant's interview, who stated that Defendant Adams said that he thought he tried to but couldn't do it, or couldn't bring himself to do it, and that her body was found nude with her hands taped behind her back, such tape applied to the victim, by sworn testimony of pathologist, Doctor Gertrude Warner of Ocala, Florida, as being applied around the wrists while the victim, Trisa Gail Thornley, was still alive.

Defendant argues that these findings do not prove that the victim's death occurred during or after the commission of a kidnapping. The state replies that the evidence is sufficient to show the crime of kidnapping was committed and cites *Miller v. State*, 233 So.2d 448 (Fla. 1st DCA 1970).

In *Brown v. Wainwright*, 392 So.2d 1327, 1331 (Fla.), *cert. denied*, — U.S. —, 102 S.Ct. 342, 70 L.Ed.2d 407 (1981), we described our function in reviewing a death sentence:

> This Court's role after a death sentence has been imposed is "review," a process qualitatively different from sentence "imposition." It consists of two discrete functions. First, we determine if the jury and judge acted with procedural rectitude in applying section 921.141 and our case law. This type of review is illustrated in *Elledge v. State*, 346 So.2d 998 (Fla.1977), where we remanded for resentencing because the procedure was flawed—in that case a nonstatutory aggravating circumstance was considered. *See also Brown v. State*, 381 So.2d 690 (Fla.1980); *Kampff v. State*, 371 So.2d 1007 (Fla.1979).
>
> The second aspect of our review process is to ensure relative proportionality among death sentences which have been approved statewide. After we have concluded that the judge and jury have acted with procedural regularity, we compare the case under review with all past capital cases to determine whether or not the punishment is too great. *Proffitt v. Florida*, 428 U.S. 242 [96 S.Ct. 2960, 49 L.Ed.2d 913] (1976); *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943 [94 S.Ct. 1951, 40 L.Ed.2d 295] (1974). In those cases where we found death to be comparatively inappropriate, we have reduced the sentence to life imprisonment. *See Malloy v. State*, 382 So.2d 1190 (Fla.1979); *Burch v. State*, 343 So.2d 831 (Fla.1977); *Jones v. State*, 332 So.2d 615 (Fla.1976).
>
> Neither of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are so supported, if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation.

(Footnote omitted.) There appears to be sufficient competent evidence in the record from which the judge could properly find that the capital felony was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, a rape or kidnapping.

[10, 11] Defendant argues that there is no crime of rape in Florida and that the

trial judge used a non-statutory aggravating factor in imposing the death sentence. The statute penalizing rape, section 794.01, Florida Statutes (1972), was repealed by chapter 74-121, section 1, Laws of Florida. Acts which would have constituted rape or attempted rape would constitute a sexual battery or attempt to commit sexual battery by virtue of section 794.011, Florida Statutes (1977). The word "rape" in section 921.141(5)(d) had not yet been changed to "sexual battery". Due process requires only that the law give sufficient notice so that men may conform their conduct so as to avoid that which is forbidden. The act itself, rather than its nomenclature, constitutes the aggravating circumstances. The trial judge did not err in finding defendant's acts constituted an aggravating factor.

[12] Defendant next argues that the trial judge erred in finding that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. § 921.-141(5)(e), Fla.Stat. The trial judge made the following finding of fact:

> That the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody is proven beyond and to the exclusion of a reasonable doubt by the facts stated above proving *kidnapping* and *rape* by the additional fact that Trisa Gail Thornley was found dead on March 15, 1978, which prevented any testimony on her part concerning kidnapping and rape some seven weeks after her disappearance while walking home from school.

The record shows that the victim knew and could have identified defendant; that he encased the body in white plastic garbage bags and tied it with rope; that he disposed of the body in a desolate area; that he concealed his crime effectively for a period of time from January 23, 1978, to March 15, 1978.

In *Riley v. State*, 366 So.2d 19 (Fla.1978), the robbery victim, who knew and could identify the defendant, had been bound and gagged. He was then shot in the head after one of the perpetrators expressed a concern for subsequent identification. This Court concluded that the aggravating circumstance existed because the defendant had killed the victim to avoid identification and arrest. *See also Hoy v. State*, 353 So.2d 826 (Fla.1977), *cert. denied*, 439 U.S. 920, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978); *Jackson v. State*, 366 So.2d 752 (Fla.1978), *cert. denied*, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979).

There was sufficient competent evidence in the record from which the judge could find that defendant committed this capital felony in an effort to avoid or prevent a lawful arrest.

Defendant also says that the trial court erred in finding that the capital felony was especially heinous, atrocious, or cruel. The trial judge made the following finding of fact:

> That the capital felony was especially heinous, atrocious or cruel is proven beyond and to the exclusion of a reasonable doubt by expert medical testimony that the autopsy, performed by Doctors Gertrude Warner and William Shutze, showed a bruise on one arm, inflicted prior to death, that the autopsy showed swelling in the hands induced by tight binding with tape prior to death, State Exhibit # 17, that the autopsy showed that the body was a nude body of an eight year old girl whose hands were tightly taped behind her back prior to death, which showed that Trisa Gail Thornley had time to anticipate her murder and that the autopsy and photographs showed seven coils of rope with a circumference of nine and three-fourths inches around the neck of Trisa Gail Thornley as shown in evidence by State Exhibit # 16, and that the child's body was placed in a plastic garbage bag and thrown in a wooded area some three miles from her home.

Defendant argues that this aggravating circumstance is devoid of factual and legal support. We disagree.

[13, 14] The fear and emotional strain preceding a victim's almost instantaneous death may be considered as contributing to the heinous nature of the capital felony. *Knight v. State*, 338 So.2d 201 (Fla.1976). A homicide committed through strangulation has been held to be especially heinous, atrocious, and cruel. *Alvord v. State*, 322 So.2d 533 (Fla.1975), *cert. denied*, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976). From defendant's statement we find that the victim was "screaming" prior to death. A frightened eight-year-old girl being strangled by an adult man should certainly be described as heinous, atrocious, and cruel. There was sufficient competent evidence in the record from which the trial judge could find the presence of this aggravating circumstance.

[15] Although the trial judge found, as a mitigating factor, that the capital felony was committed while defendant was under the influence of extreme mental or emotional disturbance, the defendant says that there should be an independent determination and finding that at the time the crime was committed the defendant's capacity to appreciate the criminality of his conduct or to conform it to the requirements of law was substantially impaired. The defendant says that his deteriorating marital situation and his wife's apparently blatant infidelity with one of his friends led to his extreme mental or emotional disturbance and clearly hampered his capacity to appreciate the criminality of his conduct or to conform it to the requirements of law. There is little, or no, causal relationship between defendant's marital problems and an eight-year-old little girl. There was no testimony that defendant had suffered from mental illness in the past. An expert witness testifying for the defense said that, in his opinion, the defendant knew the difference between right and wrong on the date of the commission of the offense. The trial court did not err in failing to find that the capacity of defendant to conform his conduct to requirements of law was substantially impaired as a result of his marital distress.

The findings of the trial judge were sufficient to show that the sentence of death resulted from reasoned judgment. This reasoned judgment comports with our consideration of other cases and the sentence of death was appropriate under the circumstances. There being no reversible error, the judgment and sentence of the trial judge are affirmed.

It is so ordered.

SUNDBERG, C. J., and OVERTON and ALDERMAN, JJ., concur.

BOYD, J., concurs in part and dissents in part with an opinion.

McDONALD, J., concurs as to conviction and dissents as to sentence.

BOYD, Justice, concurring in part and dissenting in part.

I concur in that part of the majority opinion affirming appellant's conviction of murder in the first degree.

One of the principal functions of this Court in considering cases in which the death penalty has been ordered is to review the aggravating and mitigating circumstances to assure that similar punishment is given for similar crimes.

The trial judge found three mitigating circumstances: (1) that the defendant had no significant history of prior criminal activity; (2) that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; (3) that the defendant's age (20) was of significance.

In weighing the aggravating and mitigating circumstances of this case, and comparing it with prior similar crimes of violence, it is my opinion that the law requires this Court to order a reduction in the sentence to life imprisonment without eligibility for parole for twenty-five years.

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR MARION COUNTY

CRIMINAL CASE NO. 78-366 C F A-O-1

STATE OF FLORIDA,

Plaintiff,

vs.

AUBREY DENNIS ADAMS,

Defendant.

PROCEEDINGS: Hearing

BEFORE: The Honorable William F. Edwards
Circuit Judge
Fifth Judicial Circuit of Florida

DATE AND TIME: September 7, 1984, 2:30 p.m.

PLACE: Courtroom D
Marion County Courthouse
Ocala, Florida

REPORTED BY: Jack K. Simmons, Jr., RPR-CP
Deputy Official Court Reporter
Fifth Judicial Circuit of Florida
Ocala, Florida

APPEARANCES: Gordon C. Oldham, Esquire
State Attorney
Ben Ayres, Esquire
Assistant State Attorney
Margene Roper, Esquire
Assistant Attorney General
Attorneys for State of Florida

APPEARANCES: Kenneth R. Hart, Esquire
Philip J. Padvano, Esquire

PROCEEDINGS

THE COURT: Before we begin, I would like for each of you to identify yourself for the record, please. Let's start over here with defense counsel.

MR. PADVANO: Your Honor, I'm Phil Padvano of Tallahassee for the defendant. Mr. Hart of Tallahassee will be presenting the hearing to the Court this morning, Kenneth Hart.

THE COURT: All right.

MR. OLDHAM: State Attorney Gordon Oldham of the Fifth Judicial Circuit.

MR. AYRES: Assistant State Attorney Ben Ayres.

MS. ROPER: Assistant Attorney General Margene Roper, I'm handling the appeal and assisting Mr. Ayres.

THE COURT: I would suggest perhaps that counsel might want to take a yellow pad if you're going to try to follow me. I'm prepared to make an order.

This order is to be a consolidated order concerning all six motions filed by the defendant. Statement of fact and opinion: Nothing in this order that I say should be taken to be derogatory towards the defendant's present attorneys because it is certainly not intended by this Court to be so. On the contrary, I commend Mr. Hart and his law firm for the manner in which they are handling this case.

This Court is certainly aware of the recent case of Williams vs. State, First District Court of Appeals Case Nos. AY-161, wherein the First District Court of Appeals indicated that the defendant could not waive his right under Rule 3.850. However, this Court urges the Supreme Court of the State of Florida to visit this question in this case and rule that the defendant can waive his rights to a 3.850 review under specific circumstances wherein the defendant intentionally fails to utilize his rights to a 3.850 review within a reasonable time after defendant has discovered or should have discovered the now complained of defects and when this intentional delay will frustrate the judicial process in an attempt to carry out a lawful sentence.

This Court was handed the six motions at about 4:00 p.m. on 5 September, 1984. I have not had sufficient time to draft written orders on each of these and therefore, ask the Supreme Court and the Federal Courts to overlook this technicality and accept this verbal order rendered in open court as soon as it is reduced to writing and certified by the Official Court Reporter. This is necessary in order to maintain an orderly appeal of the defendant's case through the courts. If this procedure is not accepted by the Appeals Court, then the State Attorney is directed to immediately

prepare a proposed order, transmit it to the defendant's attorney and then present it to me as soon as possible Monday morning. I'll be out of town until then.

This Court is aware that the Supreme Court has urged the lower court to hold evidentiary hearings on Rule 3.850 proceedings, see Jones vs. State, 446 Southern 2nd 1059, a Florida Supreme Court, 1984, but also recognize that in an appropriate case, the lower court may deny the defendant's request without an evidentiary hearing, see Martin v. State, Supreme Court of Florida Case Nos. 65-788, decided August 28th, 1984.

This Court is of the opinion that in this cause, no evidentiary hearing is required because of the reasons hereinafter set forth as I rule on each point of the 3.850 motion.

This Court is also aware of the rule that if the lower court does not hold an evidentiary hearing, it should attach that part of the record that conclusively shows that the defendant is entitled to no relief because of the defendant's shotgun approach to his 3.850 motion and because the Court is of the opinion that the Appeals Court will want to review the entire record in this case, the Court hereby directs the clerk to forward the entire file to the Appellate Court and this Court attaches the entire file to this order

as grounds for showing the defendant is not entitled to any relief.

Order on motions: Defendant's motion for insolvency is granted and the defendant is declared to be indigent under the meanings of the Florida law and Rule 3.111, Florida Rules of Criminal Procedure; two, defendant's motion for appointment and payment of expert investigators being the same is hereby denied upon either of the following grounds: A, as to that portion that requests experts to aid defendant's present counsel, the last sentence of Paragraph 4 seems to be requesting that this Court has no jurisdiction for such a court order as the defendant would have to file a writ of prohibition against the person responsible for carrying out the Governor's order. If defendant's attorneys now are suggesting defendant's present insanity is reasons for not carrying out said order or on the second reason, that this request is moot, based upon the ruling to be hereafter made concerning defendant's 3.850 motion.

Number three: Defendant's conditional motion for continuance is moot due to the ruling to be hereinafter made concerning defendant's application to stay execution.

Four: Defendant's application for stay of execution is hereby denied based upon the following reasoning: The law in this state and in the United States of America

is that due process requires that the defendant be given ample time to pursue his constitutional rights. The defendant has had since 16 January, 1979, to seek review of this case and to bring the matters he now attempts to raise before an appropriate court. On 4 October, 1982, certiorari to the United State Supreme Court was denied, leaving the defendant with his right to bring a 3.850 motion in this Court. The defendant has been aware or should have been aware of the irregularities he now complains of and has voluntarily chosen not to bring these to this Court's attention for approximately two years. Now he attempts to bring his twelfth hour motion to this Court strictly for the purpose of frustrating the judicial process.

In this Court's opinion, defendant has had more than a reasonable amount of time to properly present his post-conviction motions and if he has elected not to do so, then he cannot now gain by his own wrongdoing.

Number five: Defendant's motion for an evidentiary hearing and for production of defendant at that hearing is hereby denied based upon the rulings of this Court to be hereinafter entered on defendant's motion for post-conviction relief to vacate judgment and sentence rendering the same moot.

Paragraph 6: Defendant's motion for post-conviction

relief to vacate judgment and sentence is hereby denied based upon the following grounds as to each point: The defendant's first point is a death penalty based upon a verdict of guilty, which in turn is based upon a finding of premeditated murder or an alternative theory under the felony murder rule violates the Fifth, Sixth, Eighth and Fourteenth Amendments. Relief is denied as to this point because this was or should have been raised on defendant's direct appeal and not now by way of a 3850 motion, see McCrae vs. State, 437 Southern 2nd 1388, Florida 1983.

Defendant's second point is defendant's conviction and sentence were based on a statute declared unconstitutional prior to the date of the offense. This violated his rights to a fair trial and to due process under the Fifth, Sixth and Fourteenth Amendments. Relief is denied as to that point because this was or should have been raised on defendant's direct appeal and not by way of a 3.850 motion at this time. Again, McCrae vs. State, I've already given you the cite for that.

The third point defendant raises is because of the trial court's failure to instruct the jury on the elements of the underlying felony murder offense, defendant was denied a fair trial and due process under

the Fifth, Sixth and Fourteen Amendments and a sentence of death would be violative of the Eighth Amendment, relief is denied as to this point because failure to give this instruction in this particular case is not error, see Dobbert, Jr., vs. State, Supreme Court Case No. 65-782 and 65-465, decided August the 28th, 1984, and also because this was or should have been raised on defendant's direct appeal and not by way of a 3.850 motion, see McCrae vs. State.

Defendant's fourth point request is or objection is mandated instructions to the jury in the penalty phase of the capital trial to consider all of the aggravating circumstances specified in the death penalty statute creates a substantial risk that death is imposed on the basis of aggravating circumstances not supported by the evidence and are violative of the Eighth and Fourteenth Amendments. Relief is denied as to this point because this was or should have been raised on defendant's direct appeal and not by way of a 3.850 motion, McCrae v. State.

The fifth point, by allowing the jury to consider all degrees of homicides regardless of the evidentiary basis for same, the Florida death penalty statute violates the Eighth and Fourteenth Amendments. Relief is denied as to this point because this was or should

have been raised on defendant's direct appeal and not by way of a 3.850 motion, McCrae v. State.

Six, by requiring that the dealth penalty recommendation be agreed upon by seven or more jurors, the jury instructions violated the Fifth, Sixth and Fourteenth Amendments, relief is denied as to this point because this was or should have been raised on defendant's direct appeal and not by way of a 3.850 motion, see McCrae v. State.

Number seven, by failing to clearly explain the nature and function of mitigating circumstances and failing to inform the jury they could recommend life even though they found aggravating circumstances, the jury instructions violated defendant's rights under the Fifth, Eighth and Fourteenth Amendments. Relief is denied as to this point because this was or should have been raised on defendant's direct appeal and not by way of a 3.850 motion, see McCrae v. State.

The execution of the -- point eight, the execution of the defendant, in view of the overwhelming mitigating circumstances in this case constitutes excessive and disproportionate punishment forbidden by the Eighth and Fourteenth Amendments, relief as to this point is denied because this was or should have been raised in defendant's direct appeal and not by way of a 3.850

motion, see McCrae v. State.

Number nine, the application of Section 921.141 (5e), Florida Statutes, in this case is in violation of rights under the Eighth and Fourteenth Amendments in that aggravating circumstances was applied in an arbitrary fashion. Relief under this point is denied because this point was or should have been raised in the defendant's direct appeal and not by way of a 3.850 motion, see McCrae v. State.

Number ten, defendant was tried before a jury for murder in the first degree while he was not competent to stand trial. This deprived him of effective assistance of counsel and due process under the Sixth and Fourteenth Amendments. Relief is denied as to this point based upon either of the following grounds: First, because this point was or should have been raised in the defendant's appeal and not by way of a 3.850 motion, see McCrae v. State; or a review of this motion, point twelve, subparagraphs 10, 11 and 12, and a review of the court file shows that this defense was considered by the defendant's attorneys and discarded as trial tactics after a thorough investigation of the law and facts. Strategic choices of a thorough investigation of the law and facts are virtually unchallengeable, see Strickland, 104, Supreme Court, United States

2052, 1984, citing Engle (spelling) E-n-g-l-e v. Isaac (spelling) I-s-a-a-c, 456 United States 107.

Eleventh point of the defendant is that the defendant is entitled to a judicial determination of whether he is competent to proceed in this court. Relief is denied as to this point in that in this 3.850 proceeding, reserving unto the defendant his right to bring a writ of prohibition in the appropriate court and the reasoning behind this is because this type of attack is not allowed under the 3.850. There has been no attempt to attack the sentence.

Number twelve, defendant was deprived of the effective assistance of counsel at trial and at sentencing in violation of his rights under the Sixth and Fourteenth Amendments. Relief is denied as to this point upon the grounds as set forth herein as to each subpoint pointed out by the defendant. See subparagraphs 1 through 14 of Pages 21 through 23 of the defendant's motion for post-conviction relief to vacate judgment and sentence.

Subpoints 1 through 9 and 13 through 14 was or should have been raised in the defendant's direct appeal and not in a 3.850 motion, citing McCrae v. State. Subpoints 10 through 12, the reading of the motion and review of the file will show that these points are

clearly frivolous and of no merit. The defendant had two private attorneys, both known by this Court and both highly respected in the legal community. The lead counsel has an excellent background in criminal law both as a prosecutor and defense attorney and vast trial experience. A review of the file will show a thorough investigation of the law and facts by the defendant's trial counsel and their strategy should not now be challengeable. At best, defendant now -- excuse me -- at best, defendant's now assertion that his lawyers should have done these things set out in subparagraphs 10 through 13 is a mere speculation as to what an expert may have said and that had the defendant finally found an expert who could have qualified before the Court in that field and had the witness so testified that the Court and/or jury would have accepted and believed the witness, thereby changing the outcome of the trial. Pure speculation as to what might have possibly happened is not enough to have the lower court grant a 3.850 motion hearing, citing Martin vs. State, Supreme Court Case No. 65-788, decided August 28th, 1984.

A review of the file conclusively shows that the defendant's trial counsel clearly reached and exceeded the criteria to be applied in evaluating the merits of the claim of ineffective assistance of counsel as set

forth in the cases of Dobbert vs. State, Supreme Court Case Nos. 65-465 and 65-782, decided August 28th, 1984, also as set forth in Knight vs. State, 394 Southern 2nd 997, Florida Supreme Court 1981 and also under the case of Strickland v. Washington, 104 Supreme Court 2052, 1984.

This order is done and ordered in open court in Ocala, Marion County, Florida, at 2:45 p.m. on this, the 7th day of September, 1984, by William F. Edwards, Circuit Judge. The court reporter is hereby directed to immediately transcribe this order, to file the original in the court file, to forward a certified copy to Mr. Hart -- what court do you want the certified copy sent to -- the Fifth or Supreme Court?

MR. HART: Supreme Court of Florida.

THE COURT: Supreme Court of the State of Florida, to deliver a certified copy to The Honorable Gordon Oldham or his representative and to deliver a certified copy to Mr. Kenneth R. Hart or his representative. Hearing concluded.

(Hearing concluded.)

CERTIFICATE

STATE OF FLORIDA)
COUNTY OF MARION)

I, Jack K. Simmons, Jr., RPR-CP, Deputy Official Court Reporter, Fifth Judicial Circuit of Florida, do hereby certify that a hearing in the case of State of Florida vs. Aubrey Dennis Adams was held on the 7th day of September, 1984; that I was authorized to and did report stenographically the proceedings and evidence in said cause and that the foregoing pages numbered 1 through 14, inclusive, constitute a true and correct transcription of my stenographic report of the proceedings of said cause.

IN WITNESS WHEREOF I have hereunto affixed my hand this 7th day of September, 1984, at Ocala, Marion County, Florida.

Jack K. Simmons, Jr., RPR-CP
Deputy Official Court Reporter
Fifth Judicial Circuit of Florida

tion would have rendered the victim unconscious and unable to feel pain by the time the stabbing occurred. Even so, strangulation itself, with the victim fully aware of her impending doom and begging the appellant not to proceed with his evil design, was heinous, atrocious, or cruel under these circumstances. *See Smith v. State*, 407 So.2d at 903.

Appellant argues that the sentence of death is disproportional to his crime. In support of this contention he relies upon *Blair v. State*, 406 So.2d 1103 (Fla.1981); *Kampff v. State*, 371 So.2d 1007 (Fla.1979); and *Chambers v. State*, 339 So.2d 204 (Fla. 1976). Those cases, however, are distinguishable. In *Blair*, wherein several aggravating factors had been improperly found and there was a mitigating factor, this Court remanded for imposition of a life sentence because the death sentence was disproportional in that particular case. The defendant had killed his wife by shooting her after she threatened to tell the police about the defendant's relationship with her daughter. The mitigating factor in that case was that the defendant had no significant history of prior criminal activity. The only valid aggravating factor was that the felony was committed either for the purpose of preventing a lawful arrest or to disrupt or hinder the enforcement of law in concealing and preventing the reporting of sexual battery upon a minor female child.

[7] In *Kampff*, wherein the defendant killed his former wife by shooting her, there were mitigating circumstances and no proper aggravating circumstances. In *Chambers*, wherein the defendant beat his victim to death, the jury recommended life. When a jury override is involved, it is inappropriate for the trial court to impose the death penalty unless the facts suggesting death are so clear and convincing that no reasonable person could differ. *Tedder v. State*, 322 So.2d 908 (Fla.1975).

The state relies upon *King v. State*, 436 So.2d 50 (Fla.1983) and *Harvard v. State*, 414 So.2d 1032 (Fla.1982), *cert. denied*, 459 U.S. 1128, 103 S.Ct. 764, 74 L.Ed.2d 979 (1983), in arguing proportionality. These cases are more similar to the present case in that both also involved defendants killing women with whom they had a relationship after a previous conviction for a similar violent offense. The death sentences were affirmed in these cases.

[8] Appellant correctly points out that in the present case there is a mitigating factor, unlike in *King* and *Harvard*. The trial court did find that the defendant was acutely emotionally disturbed at the time of the offense, but indicated that there was some question as to the degree of the defendant's emotional disturbance, i.e., whether it was extreme. The court found that the mitigating circumstance did not outweigh the aggravating circumstances. Comparing the murder and other circumstances herein with those in the cited cases, and past capital cases, we conclude that the sentence imposed here is not comparatively disproportionate. We affirm as to this point.

For the reasons expressed, we affirm the conviction and sentence of death.

It is so ordered.

BOYD, C.J., and ADKINS, OVERTON, ALDERMAN, McDONALD, EHRLICH and SHAW, JJ., concur.

Aubrey Dennis ADAMS, Jr., Appellant,

v.

STATE of Florida, Appellee.

and

Aubrey Dennis ADAMS, Jr., Petitioner,

v.

Louie L. WAINWRIGHT, etc., Respondent.

Nos. 65845, 65853.

Supreme Court of Florida.

Sept. 11, 1984.

Defendant filed motion to vacate his conviction and sentence. The Circuit

Court, Marion County, William F. Edwards, J., denied the motion, and the defendant appealed. The defendant also filed a motion for stay of execution and petitioned for habeas corpus. The Supreme Court, Adkins, J., held that: (1) claims regarding whether defendant received ineffective assistance of trial counsel could have been raised on direct appeal and, therefore, were not properly entertained in a motion to vacate, set aside or correct sentence; (2) the failure of trial counsel to interpose objections to a general verdict of guilty and to particular jury instructions was not such a serious omission or such a deficient performance as to deprive the defendant of a fair trial; (3) the defendant's competency to stand trial was a matter which either was or should have been raised on direct appeal and, further, testimony that the defendant suffered from mental disorder at the time of his motion did not establish that he suffered from the disorder at trial; and (4) the conduct and performance of the defendant's appellate counsel was not substantially deficient.

Order affirmed; motion for stay of execution denied; petition for writ of habeas corpus denied.

McDonald, J., dissented with opinion.

1. Criminal Law ⇐998(3)

Claims that defendant received ineffective assistance of trial counsel when counsel failed to object to general verdict of guilty which was based either upon finding of premeditated murder or alternative theory of felony-murder rule and to jury instructions were matters which could have been raised on direct appeal from first-degree murder conviction and were not properly entertained in motion to vacate, set aside or correct sentence. West's F.S.A. RCrP Rule 3.850.

2. Criminal Law ⇐641.13(2)

In first-degree murder prosecution, failure of trial counsel to object to general verdict of guilty which was based either upon finding of premeditated murder or alternative theory under felony-murder rule or to various jury instructions during trial was not such serious omission or such a deficient performance as to deprive defendant of fair trial. U.S.C.A. Const. Amend. 6.

3. Criminal Law ⇐998(3, 13)

Defendant's competency to stand trial was matter which either was or should have been determined on direct appeal, not in motion to vacate, set aside or correct sentence. West's F.S.A. RCrP Rule 3.850.

4. Criminal Law ⇐998(17)

Testimony that defendant suffered from mental disorder known as catathymic amnesia, rendering him incapable of recalling traumatic experiences, which was offered in support of motion to vacate, set aside or correct sentence, was not evidence that he suffered from disorder at time of trial. West's F.S.A. RCrP Rule 3.850.

5. Criminal Law ⇐998(19)

None of the grounds asserted by defendant as deficiencies of his trial counsel warranted evidentiary hearing either because they were not cognizable in postconviction proceedings or were adequately set forth in his motion for postconviction relief so that no evidentiary hearing was necessary. West's F.S.A. RCrP Rule 3.850; U.S.C.A. Const.Amend. 6.

6. Criminal Law ⇐641.13(7)

Conduct of defendant's appellate counsel was not substantially deficient. U.S.C.A. Const.Amend. 6.

7. Criminal Law ⇐1166.11(5)

Even if appellate counsel's performance was deficient, defendant was not prejudiced. U.S.C.A. Const.Amend. 6.

Kenneth R. Hart and Timothy B. Elliott of Ausley, McMullen, McGehee, Carothers & Proctor and Philip J. Padovano, Tallahassee, for appellant/petitioner.

Jim Smith, Atty. Gen. and Margene A. Roper, Asst. Atty. Gen., Daytona Beach, for appellee/respondent.

ADKINS, Justice.

This case is before us on appeal from the trial court's denial of appellant's motion to vacate his conviction and sentence pursuant to Florida Rule of Criminal Procedure 3.850. We also have before us a motion for stay of execution and a petition for habeas corpus. We have jurisdiction. Art. V, § 3(b)(1), (9), Fla.Const.

This case has previously been before us on direct appeal from appellant's conviction of first-degree murder and sentence of death. At that time, we affirmed appellant's conviction and sentence. *Adams v. State*, 412 So.2d 850 (Fla.1982). A writ of certiorari to the United States Supreme Court was denied. *Adams v. Florida*, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982).

The facts of this case are set forth in this Court's opinion on direct appeal and will not be repeated here.

[1] Adams raises two points in his post-conviction petition. In the first of these, he claims that he received ineffective assistance of trial counsel when trial counsel failed to object to: 1) a general verdict of guilty which was based either upon a finding of premeditated murder or an alternative theory under the felony murder rule; 2) jury instructions which allowed the jury to consider all the aggravating circumstances listed in the death penalty statute even though there was no evidence to support some of these; 3) jury instructions which allowed the jury to consider all lesser degrees of homicide even though there was no evidentiary basis for them; 4) jury instructions that required the death penalty recommendation to be agreed upon by seven or more jurors, even though six is sufficient to recommend life; and 5) jury instructions that failed to clearly define and explain the nature and function of mitigating circumstances and failed to inform the jury they could recommend life even though they found aggravating circumstances. These are all matters which could have been raised on direct appeal and which, as the trial judge correctly held, were not properly entertained in a 3.850 motion. *McCrae v. State*, 437 So.2d 1388 (Fla.1983).

[2] The failure of trial counsel to interpose objections to these matters during trial was not such a serious omission or such a deficient performance as to deprive defendant of a "fair trial, a trial whose result is reliable." *Strickland v. Washington*, — U.S. —, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

Adams' second point in his post-conviction petition is likewise without merit. He argues that the trial court erred in refusing an evidentiary hearing concerning his competency to stand trial or to participate in the sentencing phase of his trial and concerning the competency of his trial counsel.

[3, 4] Regarding his competency to stand trial, Adams now argues that an expert will testify that he now suffers from a mental disorder known as catathymic amnesia, which renders him incapable of recalling traumatic experiences, and this mental disorder in turn rendered him incompetent to stand trial. Once again, his competency to stand trial is a matter which either was or should have been determined on direct appeal. *McCrae*. In his direct appeal we noted that there was no testimony that Adams had suffered from mental illness in the past. 412 So.2d at 857. In any event, the testimony that is being offered is a diagnosis of Adams' present condition and is not evidence that he suffered from this disorder at the time of trial.

[5] Finally, none of the grounds asserted by Adams as deficiencies of his trial counsel warranted an evidentiary hearing either because they were not cognizable in post-conviction proceedings or were adequately set forth in his motion for post-conviction relief so that no evidentiary hearing was necessary.

In his habeas petition, Adams argues that he received ineffective assistance of counsel at the appellate level.

The standards to be applied in determining whether a defendant was denied his sixth amendment right to effective assist-

ance of counsel were set forth by the United States Supreme Court in *Strickland*. The standards enunciated in that case do not "differ significantly" with those espoused by this Court in *Knight v. State*, 394 So.2d 997 (Fla.1981); *Jackson v. State*, 452 So.2d 533, 535 (Fla.1984). *See also Downs v. State*, 453 So.2d 1102 (Fla.1984). *Strickland* held that a defendant's claim for ineffective assistance of counsel has two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

104 S.Ct. at 2064.

To prove prejudice, the Court further stated that "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* 104 S.Ct. at 2068.

[6, 7] In applying the principles of *Strickland* to the case at bar, we find that Adam's claim of ineffective assistance of counsel on appeal, as well as at trial, must fail. The conduct and performance of Adam's appellate counsel was not substantially deficient under the circumstances. The record reflects that counsel properly prepared the case and that his strategy and decisions during the course of his representation of Adams conformed to the standards required of professionally competent counsel. Even if this Court had found counsel's performance to be deficient, we would also have concluded that his performance did not prejudice Adams.

Accordingly, we affirm the order of the trial court denying Adam's motion for post-conviction relief. The motion for stay of execution is denied. Adam's petition for writ of habeas corpus is also denied.

It is so ordered.

BOYD, C.J., and OVERTON, ALDERMAN, EHRLICH and SHAW, JJ., concur.

McDONALD, J., dissents with an opinion.

McDONALD, Justice, dissenting.

I recognize that the issue was considered in the original appeal, but I adhere to the position that in view of the mitigating circumstances in this case, and the highly questionable aggravating factor that Adams killed the eight-year-old to avoid arrest, the death penalty is improper and disproportionate for Adams. Perhaps it is because of this conclusion that I search the record to justify a stay of an event that should not transpire. In any event, I believe that there were adequate grounds alleged in the 3.850 motion to require an evidentiary hearing on some of the claims.*

* Adams submits that his trial attorney:

> (9) Remained mute while the prosecution argued that the jury consider a statutory aggravating circumstance for which there was insufficient evidentiary support. The aggravating circumstance argued was that the murder was committed for the purpose of avoiding or preventing a lawful arrest. There was absolutely no evidence to support this. Counsel thereby permitted the jury to be influenced by and to consider aggravating circumstances which were not supported by evidence and thereby violating Defendant's rights to due process. *See e.g., Gregg v. Georgia*, 428 U.S. 153, 198, 96 S.Ct. 2909, 2936, 49 L.Ed.2d 859 (1976).
>
> (10) Failed to present expert testimony as to the degree to which Defendant could control his actions or conform them to the requirements of the law.
>
> (11) Failed to adequately investigate the issue of Defendant's competency to stand trial and assist in the preparation of his defense and the issue of Defendant's sanity at the time of the alleged offense.
>
> (12) Limited the pre-trial psychiatrist examination and evaluation of the Defendant to one psychiatrist. This hampered his ability to recognize that the Defendant may have been in-

Accordingly, I would grant a stay and remand to the trial court for further proceedings.

THE FLORIDA BAR, Complainant,

v.

Gary A. POE, Respondent.

No. 64812.

Supreme Court of Florida.

Sept. 20, 1984.

Original Proceeding—The Florida Bar.

John F. Harkness, Jr., Executive Director and John T. Berry, Staff Counsel, Tallahassee, and David G. McGunegle, Bar Counsel, Orlando, for complainant.

L. Edward McClellan, Jr., Ocala, for respondent.

PER CURIAM.

This cause is before the Court on the respondent's conditional guilty plea to violations of article XI, Rules 11.02(3)(a), 11.02(4) and 11.02(4)(c) of the Integration Rule of The Florida Bar, and Disciplinary Rules 1-102(A)(4), 6-101(A)(2), 6-101(A)(3), 7-101(A)(1), 7-101(A)(2), and 9-102(B)(3) of the Code of Professional Responsibility of The Florida Bar. We approve the conditional guilty plea, and, in accordance with the plea, publicly reprimand the respondent, direct that he be placed on two years' probation, and require that he submit quarterly caseload reports to The Florida Bar.

The respondent shall appear before the Board of Governors of The Florida Bar for a public reprimand and this opinion shall be published in *Southern Reporter*.

Costs in the amount of $1,021.33 are assessed against the respondent.

It is so ordered.

OVERTON, Acting C.J., and ALDERMAN, McDONALD, EHRLICH and SHAW, JJ., concur.

CONTINENTAL VIDEO CORPORATION, Petitioner,

v.

HONEYWELL, INC., etc., Respondent.

No. 63058.

Supreme Court of Florida.

Sept. 27, 1984.

Application for Review of the Decision of the District Court of Appeal—Direct Conflict of Decisions; Third District—Case No. 81-1978.

Larry S. Stewart, James B. Tilghman, Jr. and Bruce A. Christensen of Floyd, Pearson, Stewart, Richman, Greer, Weil & Zack, Miami, for petitioner.

G. William Bissett of Preddy, Kutner & Hardy, and James E. Tribble of Blackwell, Walker, Gray, Powers, Flick & Hoehl, Miami, for respondent.

Henry I. Smyler, Miami, amicus curiae for Alarm Association of Florida, Inc.

Fred R. Ober, Henry M. Knoblock and Kathleen M. Williams of Fowler, White, Burnett, Hurley, Banick & Strickroot, Miami, amicus curiae for Wells Fargo Alarm Services.

Lawrence A. Fuller of Fuller & Feingold, Miami Beach, amicus curiae for Jewelers Mut. Ins. Co.

competent to stand trial as well as to identify other potential mitigating factors such as the ability to control his actions or to conform them to the requirements of the law.

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PLAINTIFFS	DEFENDANTS
(1) AUBREY DENNIS ADAMS	(A) LOUIE L. WAINWRIGHT (B) JIM SMITH

DEATH PENALTY

CAUSE

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

Petition for Writ of Habeas Corpus filed by state prisoner claiming denial of federal constitutional rights. 28 U.S.C. §2254

ATTORNEYS

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AND

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	FILING FEES PAID			STATISTICAL CARDS	
X CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAILED
				85	10/84
				86	

DATE	NR.	PROCEEDINGS	
09-14-84	*	Case papers filed by Kenneth Hart, counsel for petitioner.	ja
	1	MOTION for Leave to Proceed In Forma Pauperis, by petitioner.	ja 1-4
	*	RECEIVED proposed Order (1).	ja —
	2	PETITION for Writ of Habeas Corpus by a Person in State Custody.	ja 5-90
	3	MOTION for Leave to File Enlarged Petition for Writ of Habeas Corpus, by petitioner.	91-93 ja
	*	RECEIVED proposed Order (3).	ja
	4	MOTION for Stay of Execution, by petitioner.	ja 94-96
	5	MEMORANDUM of Law in Support of Petitioner's Application for Stay of Execution (4).	97-110 ja
	*	RECEIVED proposed Order (4).	ja
	6	MOTION to Admit Counsel Pro Hac Vice, by petitioner.	ja 111-115
	*	RECEIVED proposed Order (6).	ja —
	*	Pursuant to standard operating procedures, the following individuals were telephonically advised by the Jacksonville Division Manager of the filing of the Petition and Motion for Stay of Execution: 5:35 p.m. - Mr. Mickey Cortez, Cheif Deputy Clerk, 11th Circuit Court of Appeals. 5:47 p.m. - Mr. Sydney McKenzie, Legal Advisor, Governor's Office. 5.50 p.m. - Mr. Richard Dugger, Superintendent, Flrida State Prison. 6:15 p.m. - Mr. Donald R. Hassfurder, Duty Officer, Dept. of Corrections. 6:20 p.m. - Mr. George Georgeiff, Attorney General's Office. 6:45 p.m. - Mr. Mark Menser, counsel for respondents.	ja
	*	Copies of the file (items 1-6) taken to the Airport Postal Office and forwarded via Express Mail (approx 7:45 p.m.) to: Mr. Mickey Cortez - 11th Circuit Court of Appeals. Mr. Christopher Vasil - Chief Deputy Clerk, U. S. Supreme Court, Washington D.C. *Per Mr. Mark Menser, counsel for respondents, copies of documents 1-6 were received this date from counsel for petitioner, by Federal Express.	ja
09-16-84	7	MOTION for Summary Denial of Petition for Writ of Habeas Corpus and RESPONSE thereto and MEMORANDUM of Law in Support Thereof, by Respondents. (2)	116-190 ja
	8	RESPONSE to Application for Stay of Execution, by Respondents. (4)	ja 191-201

(see page 2)

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DEATH PENALTY

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	84-170-Civ-Oc-16 DOCKET NO
AUBREY DENNIS ADAMS	LOUIE L. WAINWRIGHT, et al.	PAGE 2 OF ___ PAGES

DATE	NR.	PROCEEDINGS	
9-16-84	*	Counsel for all parties telephonically notified by Judge Moore's staff of the non-evidentiary hearing on Monday, September 17, 1984, at 3:30 p.m.	ja
9-17-84	9	ORDER GRANTING Leave to Proceed In Forma Pauperis (1). JHM s/9/17/84 (copies hand-delivered to counsel of record)	202 ja
	10	ORDER that leave to file an enlarged Petition for Writ of Habeas Corpus is GRANTED. (3) JHM s/9/17/84 (copies hand-delivered to counsel of record)	203 ja
	11	ORDER that petitioner's Motion to Admit Counsel Pro Hac Vice (6) is GRANTED. JHM s/9/17/84 (copies hand-delivered to counsel of record)	204 ja
	12	MOTION to Amend Petition for Writ of Habeas Corpus by a Person in State Custody, by petitioner.	205-210 ja
	*	RECEIVED proposed order (12).	ja
	*	Copies of documents 7-12 sent by Express Mail to the following: Mr. Mickey Cortez, Cheif Deputy Clerk, 11th Circuit Court of Appeals. Mr. Christopher Vasil, Chief Deputy Clerk, U. S. Supreme Court, Washington, D.C.	ja
	13	ORDER that petnr's Motion to Amend Petition (12) is GRANTED. JHM s/9/17/84 (counsel ntfd) (Amendment attached to Order).	211-212 ja
	*	STATE COURT PAPERS RECEIVED IN THE CASE OF AUBREY DENNIS ADAMS, JR., Death Penalty Case, on September 11, 1984. Ordered to be filed as Exhibits 1, 1a-27b, by Judge John H. Moore II:	ja
		(1) TRANSCRIPT of Hearing before Hon. William F. Edwards, Circuit Court for Marion County, Florida, on 8/23/78, Case No. 78-366.	
		(1a) TRANSCRIPT of Hearing in Open Court before the Honorable William F. Edwards, Circuit Court for Marion County, Florida, Case No. 78-366, held on August 23, 1978.	
		(2-9) TRANSCRIPT'S of Proceedings on a Jury Trial held before the Honorable William F. Edwards, Circuit Court for Lake County, Florida on 10/12/78, Case No. 78-574-CP-A-01, VOLUMES 1-8.	
		(10) PROCEEDINGS on Sentencing and Hearing on Motions before the Honorable William F. Edwards, in the Circuit Court, Lake County, Florida on 1/16/79.	
		(11) INITIAL BRIEF OF APPELLANT, on Appeal in the Supreme Court of Florida, Case No. 56-134.	

(see page 3)

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(Rev. 1/75)

DEATH PENALTY

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	84-170-Civ-Oc-
AUBREY DENNIS ADAMS	LOUIE L. WAINWRIGHT, et al.	DOCKET NO. ____
		PAGE 3 OF ____ P.

DATE	NR.	PROCEEDINGS
		(12) BRIEF OF THE APPELLEE, on Appeal in the Supreme Court of Florida, Case No. 56-134.
		(13) REPLY BRIEF of Appellant, on Appeal in the Supreme Court of Florida, Case No. 56-134.
		(14) 412 Southern Reporter, 2nd Series re: Aubrey Dennis Adams, Jr.
		(15) RECORD ON APPEAL to the Supreme Court of Florida from the Circuit Court for Marion County, Florida, Case No. 78-366-CF-A-01.
		(16) TRANSCRIPT of Proceedings re: Hearing held 9/7/84, (3.850) before the Hon. William F. Edwards.
		(17) PETITION for Writ of Habeas Corpus, Supreme Court of Florida.
		(18) APPENDIX to Petition for Writ of Habeas Corpus, Supreme Court of Florida.
		(19) RESPONSE to Petition for Writ of Habeas Corpus, Supreme Court of Florida.
		(20) APPELLANT'S BRIEF, in the Supreme Court of the State of Florida.
		(21) ANSWER BRIEF of Appellee.
		(22) MOTION by Appellee for Leave to File Enlarged Brief, Case No. 56-134.
		(23) APPLICATION FOR STAY OF EXECUTION and Points and Authorities in Support thereof, Case No. 56-134, Supreme Court of Florida.
		(24) RESPONSE by State to Motion for Stay of Execution.
		(25) SUPPLEMENTAL RECORD ON APPEAL, in the Supreme Court, Case No. 78-366-CF-A-1.
		(26) OPINION from the Supreme Court of the State of Florida re: "Accordingly, we affirm the order of the trial court DENYING Adam's Motion for Post-conviction relief. The motion for stay of execution is DENIED. Adam's Petition for Writ of Habeas Corpus is also DENIED".
		(27a and 27b) STATE'S EXHIBITS 16 and 17 from trial court, Ocala, Florida, marked for identification as (rm) and (uu), forwarded per Margene Roper, counsel for respondents, on 9/13/84.

(see page 4)

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(Rev. 1/79)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	84-170-Civ-Oc-16 DOCKET NO
AUBREY DENNIS ADAMS	LOUIE L. WAINWRIGHT, ET AL.	PAGE 4 OF ___ PAGES

DATE	NR.	PROCEEDINGS	
9-18-84	14	ORDER: that the Clerk of this Court file the record of the State Court proceedings as part of the record in this cause. JHM s/9/18/84 (counsel ntfd)	213- ja
	15	OPINION AND ORDER: 1. The Petition for Writ of Habeas Corpus is DENIED. (2) 2. Petitioner's motion for stay of execution (4) is DENIED. 3. The Clerk of this Court shall enter judgment dismissing this action. JHM s/9/18/84 at 2:48 a.m. (counsel ntfd)	214-240 ja
	16	JUDGMENT: Pursuant to Order filed 9/18/84, the Petition for Writ of Habeas Corpus is DENIED, and Petitioner's motion for stay of execution is DENIED. This case isdismissed. clerk/9/18/84 (counsel ntfd) MR106/1425	241 ja
	17	APPLICATION for Certificate of Probable Cause and Certificate to Appeal In Forma Pauperis, by petitioner.	242-245 ja
	18	RESPONSE in Opposition to Motion for Certificate of Probable Cause and Memorandum of Law in Support (17), by respondents.	246-249 ja
	19	ORDER GRANTING Certificate of Probable Cause (17) and Leave to Appeal In Forma Pauperis. JHM s/9/18/84 (counsel ntfd)	250-251 ja
	20	NOTICE OF APPEAL of Opinion and Order (15) entered 9/18/84, filed by petitioner.	252-253 ja
	21	MOTION for Stay of Execution Pending Appeal to the Court of Appeals for the Eleventh Circuit, by petitioner.	254-256 ja
	22	ORDER: Petitioner's motion for stay pending appeal (21) is DENIED. JHM s/9/18/84 (counsel ntfd)	257 ja
	*	2:52 a.m. - 3:25 a.m. The following persons were telephonically notified of the Opinion and Order (15), Granting of the Certificate of Probable Cause and Application to proceed In Forma Pauperis: Ms. Margene Roper, counsel for respondents. Mr. Mickey Cortez, Cheif Deputy Clerk for the 11th Circuit Court of Appeals. Donna Scruggs, Secretary to Louie Wainwright, Dept. of Corrections. Mr. Kenneth Hart, counsel for petitioner. Mr. Richard Dugger, Supt. of Fla. State Prison. Mr. Art Wiedinger, Governor's Office.	ja

(see page 5)

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CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	84-170-Civ-Oc-16 DOCKET NO.
AUBREY DENNIS ADAMS	LOUIE L. WAINWRIGHT, et al.	PAGE 5 OF ___ PAGE

DATE	NR.	PROCEEDINGS	
09-18-84	*	Copies of documents 13-22 sent by Express Mail to Margene Roper, counsel for respondents; Philip Padavano and Kenneth Hart, counsel for petitioner.	ja
	*	RECORD ON APPEAL sent by Delta Dash to Court of Appeals. 1 volume of the Record, and 1 box of exhibits (1,1a-27b).	ja

I certify the foregoing to be a true
and correct copy of the original.
DONALD M. CHAMBLIN, Clerk
United States District Court
Middle District of Florida
By: Paula J. Goers
Deputy Clerk

FILED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

SEP 17 3 29 PM '84

AUBREY DENNIS ADAMS,)
Petitioner,)
vs.) CIVIL ACTION NO. 84-170-CIV-OC-16
LOUIS L. WAINWRIGHT)
Respondent.)

ORDER ALLOWING AMENDMENT

On motion of Petitioner, AUBREY DENNIS ADAMS, for an order granting permission to amend his pleadings as shown in the proposed amendment attached hereto as Exhibit "A",

It is hereby ORDERED that Petitioner's motion to amend is hereby GRANTED.

DONE and ORDERED this 17 day of September, 1984.

JUDGE JOHN H. MOORE II
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
~~JACKSONVILLE~~ DIVISION
Ocala

AUBREY DENNIS ADAMS,)
Petitioner,)
vs.) CIVIL ACTION NO 84-170-CIV-OC-1
LOUIS L. WAINWRIGHT)
Respondent.)
)

AMENDMENT TO PETITION
FOR WRIT OF HABEAS CORPUS

G(1)(g) Trial Counsel Failed to Adequately Investigate, Develop, and Present Evidence in Mitigation in the Sentencing Phase of Petitioner's Trial

See Point E above for a discussion of certain psychological disorders of the Petitioner which should have been presented to the trial court during the sentencing phase of the trial in mitigation of Petitioner's sentence.

In addition, if the Petitioner is granted the evidentiary hearing to which he is entitled (See Point G(2)), the Petitioner will present evidence that, at the time of the crime, he was psychotic and paranoid; he had impaired judgment as a result of a mental disorder; and was unable to control his actions or to conform them to the requirements of the law. Furthermore, Petitioner will show that this evidence should have been discovered and presented to the trial court during the sentencing phase of his trial.

EXHIBIT A

FILED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

Sep 18 2 ns AM '84

J. [illegible], FLORIDA

AUBREY DENNIS ADAMS, Jr.,

Petitioner,

vs. No. 84-170-Civ-Oc-16

LOUIE L. WAINWRIGHT, etc., et al.,

Respondents.

OPINION AND ORDER

This cause is before this Court on the petition for writ of habeas corpus filed on Friday, September 14, 1984, at 5:13 p.m., by AUBREY DENNIS ADAMS, JR., a death-row inmate at Florida State Prison. Respondents filed their response on Sunday, September 16, 1984, at 11:18 a.m. A hearing on this petition was held on Monday, September 17, 1984, commencing at 3:30 p.m. After a careful and thorough review of the record in this cause, and after hearing argument of counsel for the respective parties, this Court is of the opinion that the petition for writ of habeas corpus should be denied.

Procedural History

On October 20, 1978, following indictment and jury trial, petitioner was convicted of the first-degree murder of Trisa Gail

Thornley in the Circuit Court of the Fifth Judicial Circuit, in and for Marion County, Florida. On October 27, 1978, the jury rendered an advisory sentence recommending death by electrocution, and on January 16, 1979, the trial judge imposed the sentence of death by electrocution. The Supreme Court of Florida affirmed Petitioner's conviction and sentence on direct appeal in Adams v. State, 412 So.2d 850 (Fla. 1982). The United States Supreme Court denied certiorari in Adams v. Florida, 459 U.S. 882 (1982).

On August 21, 1984, the Governor of the State of Florida signed a death warrant ordering Petitioner's execution during the week commencing September 13, 1984. Execution is scheduled for September 19, 1984, at 7:00 a.m. On September 5, 1984, the Petitioner filed a motion for post-conviction relief, pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, challenging the validity of his conviction and sentence. Upon denial of that motion, Petitioner filed his appeal to the Florida Supreme Court on September 7, 1984. He also filed a petition for writ of habeas corpus before the Florida Supreme Court, together with an application for a stay of execution. On September 11, 1984, in a combined opinion, the Florida Supreme Court affirmed the denial of Petitioner's post-conviction motion, denied the petition for writ of habeas corpus, and denied petitioner's motion for stay of execution.

Grounds for Relief

The Petitioner raises a multitude of issues in support of his petition, each of which will be resolved seriatim in the order in which they are presented in the petition.

Petitioner's first contention is that his right to a fair trial and to due process under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution was violated because the conviction and sentence were based upon a statute declared unconstitutional prior to the date of his offense. In essence, the Petitioner contests the trial court's instructions to the jury on first degree murder. In defining murder and its degrees, the trial court advised the jury with respect to felony murder as follows:

> The killing of a human being in committing, or in attempting to commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping is murder in the first degree even though there is no premeditated design or intent to kill.

Because the abominable and detestable crime against nature was declared unconstitutional and void for vagueness in Franklin v. State, 257 So.2d 21 (Fla. 1971), it is asserted that the trial court erred by including this crime in its felony murder charge.

In Stromberg v. California, 283 U.S. 359 (1931), the United States Supreme Court held that "a general verdict must be set aside if the jury was instructed that it could rely on any of two

or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground." Zant v. Stephens, 103 S.Ct. 2733 (1983). As the Court clarified in Zant, "[c]ases in which this rule has been applied all involved general verdicts based on a record that left the reviewing court uncertain as to the actual ground on which the jury's decision rested." Id. at 2745 (emphasis added).

Upon an exhaustive review of the record in this cause, this Court is convinced that the jury's verdict of first degree murder was undoubtedly based upon a finding of premeditated murder. Initially, the Court notes that the Florida Supreme Court, on direct review of the conviction and sentence, held that the evidence was sufficient to show a premeditated design on the part of the Petitioner to murder the victim. 412 So.2d at 852. It would serve no purpose here to reiterate the facts of this case which are clearly enunciated in the Florida Supreme Court's opinion. This Court's independent review of the record reveals that the Petitioner was indicted on a charge of premeditated murder and that the indictment was silent as to a felony murder. This indictment was submitted to the jury during its deliberations. Although it is clear in Florida that such an indictment is sufficient to support a prosecution on a felony murder theory, the record clearly shows that this theory was not advanced in the trial of this case. The victim was found with rope wrapped around her neck seven times, the unchallenged medical testimony was that strangulation was the probable cause of death, and both

counsel for the State and the Petitioner focused exclusively on premeditation in their final arguments to the jury.

Even more convincingly, the trial court's instructions to the jury did not charge the jury to find a verdict based upon a theory of felony murder. Rather, the trial court merely provided the jury with the then statutory definitions of the various degrees of murder. The judge's actual charge to the jury is contained in his summarization following the definitions, as follows:

> To summarize: The essential elements of an unlawful homicide which must be proved beyond a reasonable doubt in this case before there can be a conviction of any offense are as follows: (1), that Trisa Gail Thornley is, in fact, dead; (2), that the killing was wrongful and by the means stated in the indictment; (3), that Trisa Gail Thornley was killed by the defendant; and, (4), that the killing was neither justifiable or excusable homicide.
>
> If the elements are established then it will be necessary for you to determine the degree of the unlawful homicide.
>
> If the defendant, in killing the deceased, acted from a premeditated design to effect the death of the deceased, or some other human being, he should be found guilty of murder in the first degree.
>
> If the killing was not from a premeditated design to effect the death of any human being, but was in the perpetration of an act imminently dangerous to another, evincing a depraved mind, regardless of human life, the defendant should be found guilty of murder in the second degree.
>
> If the killing took place while the defendant was engaged in the commission of a felony other than arson, rape, robbery, burglary, the abominable and detestable crime

> against nature or kidnapping, the defendant should be found guilty of murder in the third degree.
>
> If the killing was by the act, procurement or culpable negligence of the defendant and was not murder in any degree or justifiable or excusable homicide, the defendant should be found guilty of manslaughter.
>
> Of course, if any one of the essential elements of any unlawful homicide has not been proved beyond a reasonable doubt, the defendant should be found not guilty.

Thus, the case was not submitted to the jury on a felony murder theory, and following these instructions, the jury would not have returned a verdict of murder in the first degree unless it found the murder to be a premeditated one. Accordingly, the Stromberg rule is inapplicable because this reviewing Court is certain that the jury's verdict rested upon a finding of premeditated murder.

Petitioner's next claim is based upon the trial court's failure to instruct the jury on the elements of the underlying felony murder offenses as discussed above. Although this ground for relief may be subject to a procedural default bar, pursuant to Wainwright v. Sykes, 433 U.S. 72 (1977), the Florida Supreme Court reviewed this issue on the merits and, therefore, the claim is not barred from review by Florida's contemporaneous objection rule. Engle v. Isaac, 456 U.S. 107, 135 n.44 (1982).

This Court has limited authority to review jury instructions in a habeas corpus proceeding arising out of a state court criminal trial. As the United States Supreme Court noted in

Henderson v. Kibbe, 431 U.S. 145 (1977), "[t]he burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal." Id. at 154. The test is "'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process,' not merely whether 'the instruction is undesirable, erroneous, or even universally condemned.'" Id. quoting Cupp v. Naughten, 414 U.S. 141, 146-47 (1973). Interestingly, the Supreme Court emphasized that an incomplete instruction is less likely to be prejudicial than a misstatement of the law. 431 U.S. at 155.

This Court finds that the failure to instruct the jury on the underlying elements of sexual battery and kidnapping did not constitute an egregious error that infected the entire trial so profoundly that Petitioner's due process rights were violated. "Even if we were to make the unlikely assumption that the jury might have reached a different verdict pursuant to an additional instruction, that possibility is too speculative to justify the conclusion that constitutional error was committed." 431 U.S. at 157.

Because the allegedly inadequate jury instruction was not constitutionally infirm, Stromberg does not require reversal of Petitioner's conviction. Even had the jury instruction been so egregious as to violate due process, this Court has already

determined from a review of the record that the jury verdict rested upon a finding of premeditated murder. This second claim is thus also without merit.

Petitioner's next claim is that the death sentence constitutes excessive and disproportionate punishment in violation of the Eighth and Fourteenth Amendments in light of the overwhelming mitigating circumstances in this case which Petitioner submits outweigh the aggravating circumstances.

The record discloses that the trial court found the existence of the following three mitigating circumstances:

> 1. The Petitioner had no significant history of prior criminal activity;
>
> 2. The capital felony was committed while the Petitioner was under the influence of extreme mental or emotional disturbance; and
>
> 3. The age of the Petitioner, twenty, was of significance.

In Proffitt v. Florida, 428 U.S. 242 (1976), the United States Supreme Court declared constitutional on its face Florida's capital sentencing procedure, including its provision for weighing of aggravating and mitigating circumstances. The Court held:

> While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of Furman are satisfied when the sentencing authorities' discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.
>
> The directions given to judge and jury by the Florida Statute are sufficiently clear and precise to enable the various aggravating

> circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.
>
> Finally, the Florida Statute has a provision designed to assure that the death penalty will not be imposed on a capriciously-selected group of convicted defendants. The Supreme Court of Florida reviews each death sentence to insure that similar results are reached in similar cases.

Id. at 258. (Footnote omitted).

On direct appeal of Petitioner's sentencing and conviction, the Florida Supreme Court on its own independent review of the record held that the trial court exercised reasoned judgment in imposing the death sentence and that the sentence comported with that of other capital cases. 412 So.2d at 857. This Court is satisfied on its own review and examination of the record that the Florida Supreme Court's review of Petitioner's death sentence was not arbitrary and capricious or in disaccord with constitutional principles relating to sentencing in capital cases. Ford v. Strickland, 696 F.2d 804, 819 (11th Cir. 1983). Accordingly, because the state courts acted pursuant to a properly drawn statute with constitutionally adequate standards to guide discretion, Petitioner's claim is dismissed as non-meritorious.

Petitioner's fourth claim for relief alleges that the trial judge applied Section 921.141(5)(e) of the Florida Statutes in an arbitrary fashion in violation of his Eighth and Fourteenth Amendment rights. At the sentencing phase of the trial, the

trial judge determined that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. This finding was based upon evidence that the defendant kidnapped and raped the victim, that the victim knew and could have identified defendant, that the victim was found dead, which prevented any testimony on her part concerning the kidnapping and rape, that the defendant encased the body in plastic garbage bags and tied it with rope, and that he disposed of the body in a desolate area. Petitioner's contention is that if these bases are sufficient to support a finding of this aggravating factor, then the aggravating factor was arbitrarily applied because that factor would be found in every murder where a body is hidden or concealed.

The United States Supreme Court has held that an aggravating factor may be unconstitutional if applied in an arbitrary manner and if there is "'no meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not.'" Gregg v. Georgia, 428 U.S. 153, 188 (1976), quoting Furman v. Georgia, 408 U.S. 238, 313 (1972). (White, J., concurring). Petitioner's claim that the aggravating factor was arbitrarily applied in this case is nonetheless clearly without merit. The aggravating factor of avoiding arrest was not found in this case simply because the victim's body was hidden; rather, the evidence supports the finding that death was preceded by kidnapping and rape and that the victim was murdered

to prevent defendant's discovery and conviction for these felonies.

Petitioner's fifth claim is that he was deprived of due process under the Sixth and Fourteenth Amendments because he was tried before a jury for first degree murder while he was incompetent to stand trial.

Petitioner first asserted this claim on September 5, 1984, in his motion for post-conviction relief to vacate the judgment and sentence. The state court summarily denied Petitioner's claim on the basis that competency is a matter which should have been presented on direct appeal and, therefore, Petitioner was procedurally barred from raising this claim in a collateral proceeding. He argues that this Court should simply disregard this procedural bar and address the merits of Petitioner's claim since, under Pate v. Robinson, 383 U.S. 375 (1966), a defendant's competency to stand trial is not an issue that can be waived. However, this Court finds that Pate is not controlling because the Court found ample evidence in that case that Robinson's sanity was very much at issue during the trial. The Court thus concluded that Robinson was constitutionally entitled to receive a hearing on the issue of his competency. As discussed below, the record in this case reveals that while Petitioner's sanity might have been initially considered as a possible defense, Petitioner's trial counsel subsequently discarded it. Nonetheless, due to the nature and import of this habeas petition, the possibility that Petitioner's alleged incompetency to stand trial

involves fundamental constitutional error to which procedural default does not apply, and because the competency claim is subsequently raised in Petitioner's effective assistance of counsel arguments, the Court now reviews Petitioner's competency claim on the merits.

The test for competence to stand trial is whether the defendant has sufficient present ability to consult with his attorney with a reasonable degree of rational understanding and whether the defendant possesses a rational and factual understanding of the proceedings against him. Dusky v. United States, 362 U.S. 402 (1960). Before a federal habeas court will entertain a claim grounded on incompetency at trial, it requires Petitioner to prove by clear and convincing evidence sufficient facts that positively, unequivocally and clearly generate a real, substantial and legitimate doubt as to Petitioner's competency at trial. Pride v. Estelle, 649 F.2d 324 (5th Cir. 1981). As recently stated in Johnson v. Estelle, 704 F.2d 232, 237-38 (5th Cir. 1983), the sole issue is whether the habeas petitioner had the present mental ability to meaningfully participate in his defense. Facts which would raise a legitimate doubt include: (1) a history of mental illness, and (2) substantial evidence of mental incompetence at or near the time of trial supported by the opinion of qualified physicians and the testimony of laymen. Id. at 238.

Petitioner raises two grounds to support his argument that a legitimate doubt exists that Petitioner was incompetent to stand

trial. First, Petitioner contends that trial counsel specifically told the State trial court that Petitioner was unable to assist him at trial. Second, Petitioner refers to a post-conviction evaluation of Petitioner by Sandra Gilels, Ph.D., which demonstrates that Petitioner has mental disorders that render him incapable of recalling traumatic experiences.

This Court finds, however, that Petitioner has not proven by clear and convincing evidence facts to raise a legitimate doubt of Petitioner's competence at trial. The record shows that on April 11, 1978, Petitioner's attorney filed a motion for an order directing the Sheriff to allow admission of psychiatrists into Marion County Jail for purposes of examining Defendant and possibly initiating an insanity defense. This motion was granted on April 14, 1978. On April 17, 1978, a hearing was held wherein the issue of Petitioner's competency was raised. Petitioner's trial counsel expressly stated that he knew of no evidence at that time to suggest Petitioner was incompetent, and that it would therefore be highly improper for the Court to order a competency examination. Trial counsel made it clear that the psychiatric examination was instigated by the defense for purposes other than to challenge Petitioner's competency. Petitioner's argument that trial counsel specifically told the State trial court that Petitioner was unable to assist him at trial thus appears self-serving because it is (1) found in the record as part of the presentence investigation report ordered by the

Court after Petitioner's conviction,[1] and (2) stands in contrast to the colloquy during pretrial when trial counsel was formulating trial strategy.

Dr. Gilel's psychological evaluation of Petitioner does not prove by clear and convincing evidence the real and legitimate doubt required by Pride v. Estelle, supra. As the Florida Supreme Court stated in its denial of Petitioner's motion for post-conviction relief, Dr. Gilel's testimony is a diagnosis of Petitioner's present condition and is not evidence that he suffered from this disorder at the time of trial.

This Court's review of the record evinces nothing to refute the fact that Petitioner had a present ability to consult with his lawyer with a reasonable degree of rational understanding and that he possessed a rational and factual understanding of the proceedings. Dusky v. United States, 362 U.S. 402 (1960). A federal habeas court must not overturn a state court's factual conclusions unless it determines that these conclusions are not fairly supported by the record. Maggio v. Fulford, 103 S.Ct. 2261 (1983).

To summarize, Petitioner waived his competency defense on direct appeal and the record does not support a finding that Petitioner was constitutionally entitled to a competency hearing.

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[1] Trial counsel's actual statement was: "Prior and during the trial, Dennis Adams could not remember and therefore could not provide information concerning the killing that would assist with his defense." This is significantly different from a contention that the Petitioner did not have a present ability to consult with his lawyer with a reasonable degree of rational understanding.

Assuming, without deciding, that Petitioner alleges a claim involving fundamental error to which procedural default does not apply, Petitioner has not demonstrated the requisite proof under Pride v. Estelle to assert a competency claim on petition for habeas corpus.

Petitioner's sixth claim for relief asserts that the admission of two gruesome photographs of the victim rendered his trial fundamentally unfair and, therefore, denied his Sixth and Fourteenth Amendment rights. The first photograph, State's Exhibit No. 16, is a photograph showing the rope found around the victim's neck when the body was discovered. The second photograph, State's Exhibit No. 17, shows the tying of the victim's hands and the tape that was found on the hands.

Although a Court considering a petition for a writ of habeas corpus does not sit to review questions solely evidentiary in nature, this Court is nevertheless obligated to examine the constitutional implications of the admission of these photographs. Osborne v. Wainwright, 720 F.2d 1237 (11th Cir. 1983). The questions before the Court are whether these photographs were erroneously admitted and, if so, whether the error was so significant as to deny fundamental fairness to the petitioner. The evidentiary mistake must be "material in the sense of a crucial, critical, highly significant factor." Corpus v. Beto, 469 F.2d 953, 956 (5th Cir. 1972).

Petitioner argues that the photo showing rope around the victim's neck is irrelevant and cumulative. The State's theory

that the murder was premeditated hinged in part on a finding that death occurred by strangulation. As noted previously herein, the unchallenged medical testimony at trial indicated that strangulation was the probable cause of death. This photograph was therefore relevant to show whether death occurred by strangulation and, consequently, whether defendant was guilty of premeditated murder. In addition, this evidence was not cumulative, since defense counsel emphasized on cross-examination that the expert witnesses could not be absolutely certain that strangulation was the cause of death.

The second photograph, showing the tying of the victim's hands, was relevant to show the cause and circumstances of death. Although testimony establishing that tape was found on the victim's hands was not challenged by the defense, this photograph was not unduly cumulative, and the State trial judge did not err in admitting it. Certainly, no error was committed of sufficient magnitude as to significantly affect the fairness of Petitioner's trial. See Adams v. State, 412 So.2d 850, 853-854 (Fla. 1982).

Petitioner's final claim is that he was denied his constitutional right to the effective assistance of counsel at trial and on appeal. This claim involves several subparts. Petitioner alleges his trial counsel rendered ineffective assistance in failing to raise seven issues at trial. He also claims his appellate counsel rendered ineffective assistance in failing to raise and effectively argue five of the same seven issues erroneously omitted at trial. Finally, he argues that appellate counsel's

failure to object to the felony murder instructions denied his right to a full and meaningful direct appeal.

In the recent case of Strickland v. Washington, 104 S.Ct. 2052 (1984), the United States Supreme Court articulated the proper standards for judging Petitioner's contention that his conviction or death sentence must be set aside because he was denied his constitutional right to effective assistance of counsel. First, Petitioner must show that counsel's performance was so deficient that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, Petitioner must show that the deficient performance prejudiced the defense; that is, that the result of the proceeding probably would have been different had counsel not made the unprofessional errors. As the Supreme Court noted, the Court need not determine whether counsel's performance was deficient when it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice. Id. at 2069-70.

The law is well established that a defendant has the right to effective assistance of counsel on appeal. Anders v. California, 386 U.S. 738 (1967). Because five of the issues allegedly erroneously omitted on appeal are identical to those allegedly erroneously omitted at trial, these five issues will be analyzed first.

Petitioner first contends that both trial and appellate counsel erred in failing to object to a general verdict of guilty that was based upon either a finding of premeditated murder or

felony murder. Petitioner asserts that an objection based on Enmund v. Florida, 458 U.S. 782 (1982), would have been appropriate because the verdict could have been based upon felony murder even though the jury did not specifically find Petitioner deliberately killed the victim. Again, however, this Court reiterates its determination that the jury verdict rested on a finding of premeditated murder. Moreover, Enmund held only that one who aids and abets a planned robbery cannot constitutionally be sentenced to death when he personally did not kill, attempt to kill, or have any intention of participating in or facilitating a murder. The Eleventh Circuit recently held that the death penalty is not disproportionate to the culpability of one who, acting alone, personally kills his victim. Adams v. Wainwright, 709 F.2d 1443, 1447 (11th Cir. 1983). Thus, even if Petitioner's trial and appellate counsel had objected to the absence of a specific finding that Adams deliberately killed his victim, this objection would have been without merit. Petitioner, therefore, cannot satisfy the second standard set forth in Strickland, that counsels' alleged error prejudiced the defense.

Second, Petitioner alleges his trial and appellate counsel erred in failing to object to jury instructions which allowed the jury to consider all aggravating circumstances enumerated in the death penalty statute, even though the evidence did not support several of these circumstances. Petitioner argues these instructions did not channel consideration of aggravating circumstances as mandated by the United States Supreme Court in

Godfrey v. Georgia, 446 U.S. 420 (1981), and Proffitt v. Florida, 428 U.S. 242 (1976).

The trial court's instructions to the jury tracked Florida's death penalty statute, Fla. Stat. § 921.141(5)(supp. 1976-1977). A review of the sentencing phase of the record additionally reveals that the trial judge instructed the jury to consider only the evidence presented. He then instructed the jury on what proof constituted an aggravating circumstance and that "[e]vidence intending to establish an aggravating circumstance which does not convince you beyond a reasonable doubt of the existence of such circumstance at the time of the offense is to be wholly disregarded."

In light of these instructions, the Court finds Petitioner's contention to be without merit. There is no indication whatsoever that the jury's sentencing discretion was unconstitutionally broadened. The jury was directed to consider all of the evidence in the case in reaching its decision and was clearly instructed on the level of proof required to establish aggravating circumstances. Hence, counsels' failure to object to the instructions on aggravating circumstances did not constitute ineffective assistance of counsel, since such an objection would have been without merit.

Petitioner's third contention is that his trial and appellate counsel erroneously failed to object to jury instructions that required the death penalty advisory sentence to be agreed upon by seven or more jurors. The standard jury

instruction for Florida capital cases at the time of trial, between 1975 and 1981, provided that the jury be instructed that "[t]he law requires that seven or more members of the jury agree upon any recommendation advising either the death penalty or life imprisonment." Florida Standard Jury Instructions in Criminal Cases, 80 (1975). The instruction has been changed to direct that six or more votes is sufficient to recommend life imprisonment, see Florida Standard Jury Instructions in Criminal Cases, 82 (1981), but the instructions still charge the jury to return its recommendation "when seven or more are in agreement as to what sentence should be recommended to the court." Id. Moreover, while the instruction has been altered somewhat since Petitioner's trial, the statute upon which that instruction was based has not been changed since it was upheld by the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242 (1976).

Petitioner asserts that Rose v. State, 425 So.2d 521 (Fla. 1982), established that the standard jury instruction given in Petitioner's trial was an erroneous statement of the law and that this erroneous instruction may have caused a juror to surrender an honest conviction on the belief that his or her vote was necessary to reach a verdict. However, Petitioner misconstrues the holding of Rose. That case merely stands for the proposition that an "Allen charge" should not be given to coerce the jury into reaching a majority verdict when the jury reported to the judge that it was "tied six to six, and no one will change

their mind at the moment." Rose, 425 So.2d at 525. Since evidence of a jury deadlock is entirely lacking in this case, Rose does not apply.

Because the trial judge charged the jury with the standard jury instruction in effect at the time of the trial, and because both the previous and current jury instructions track the statute which has been upheld by the United States Supreme Court, counsels' failure to object to these instructions did not prejudice the defense or constitute a professionally unreasonable error. Thus, Petitioner has not established that either the performance or the prejudice standard of Strickland is satisfied.

Fourth, Petitioner claims that trial and appellate counsels' failure to object to the jury instructions' inadequate explanation of the nature and function of mitigating circumstances constituted ineffective assistance of counsel. It is well-settled that jurors must receive instructions that adequately guide their consideration of mitigating circumstances. See Tucker v. Zant, 724 F.2d 882 (11th Cir. 1984). The record in this case reveals that the trial court instructed the jury to consider mitigating evidence, defined mitigating factors as factors which point toward recommending life imprisonment, and explained that no limitation exists on the type of mitigating factors that may be considered, that mitigating circumstances should be weighed against aggravating circumstances, that this balancing process should not involve merely counting the

mitigating and aggravating circumstances but should involve the exercise of reasoned judgment, and that life imprisonment should be recommended if the jury did not find that sufficient aggravating circumstances existed. The instructions clearly contained adequate guidelines to inform the jurors of their duties involved in rendering their advisory sentence. Any objection based on this ground would therefore have been without merit, and Petitioner cannot establish sufficient prejudice to the defense to satisfy the Strickland test for ineffective assistance of counsel.

Petitioner's fifth claim is that trial and appellate counsel should have objected to the trial judge's instruction on all lesser degrees of homicide because there was no evidentiary basis for these lesser offenses. At the time of trial, Florida law required jury instructions in first degree murder cases to include charges on all degrees of homicide, regardless of the evidentiary basis for these offenses. Petitioner alleges that instructions on lesser included offenses, regardless of the existence of an evidentiary basis for these offenses, led to "jury pardons" which resulted in arbitrary sentences in capital cases. The "pool" of capital cases against which Petitioner's case has been compared is thus allegedly infected with arbitrariness in violation of Godfrey v. Georgia, 446 U.S. 420 (1981).

This Court declines to strike Florida's entire capital sentence scheme as unconstitutional on the speculative ground

that juries in other cases may have disregarded the trial judge's instructions to base their verdict on the evidence before them. Jurors are presumed to follow the law as they are instructed. In Proffitt v. Florida, 428 U.S. 242 (1976), the United States Supreme Court specifically upheld the constitutionality of the Florida law requiring the jury's consideration of lesser included offenses. As the Court explained in Gregg v. Georgia, 428 U.S. 153 (1976), "[n]othing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." Id. at 199. This claim, like the preceding four claims, is thus wholly without merit. Trial and appellate counsels' failure to raise this objection cannot constitute ineffective assistance of counsel because the defense was in no way prejudiced by the omission, as required by Strickland.

Petitioner additionally asserts that trial counsel erred in failing to investigate and present evidence that Petitioner was incompetent to stand trial and/or to participate in the sentencing phase of trial. The record in this case reflects that trial counsel provided the reasonably effective assistance guaranteed by the Sixth Amendment. As noted in Strickland, "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." 104 S.Ct. at 2065. The presentence investigation report indicates that trial counsel had

known the defendant for some time. Moreover, as noted previously herein, trial counsel specifically advised the Court that a competency hearing would be inappropriate under Florida law since no evidence had been submitted to suggest that defendant was not presently competent to stand trial. Finally, a psychiatrist hired by the defense subsequently examined the defendant, albeit concerning defendant's sanity at the time of the commission of the offense, and this psychiatrist did not suggest defendant was incompetent to stand trial. The record thus reflects that, under the circumstances, counsel's decision not to pursue the competency issue could well be considered sound trial strategy. See Strickland, 104 S.Ct. at 2065-66. Applying the requisite heavy measure of deference to counsel's judgments, this Court does not find counsel's failure to pursue the competency claim was professionally unreasonable.

Finally, Petitioner claims that appellate counsel erred in failing to object to the jury instructions that charged the jury it could find defendant guilty of first-degree murder for crimes which do not exist and that failed to instruct on the elements of the underlying felonies. This Court dismissed these claims on the merits at the outset of this opinion and, thus, the outcome of Petitioner's case would not have been any different had appellate counsel objected to the instructions on these grounds.

In sum, then, all of the alleged errors of trial and appellate counsel must fail under the Strickland test, and

Petitioner has not been denied his Sixth and Fourteenth Amendment right to effective assistance of counsel.

Petitioner's last contention is that he is entitled to an evidentiary hearing on the claim that he was deprived of effective assistance of counsel at trial and at sentencing because trial counsel failed to investigate, develop and present evidence of incompetence.

In Townsend v. Sain, 372 U.S. 293 (1963), the Supreme Court held that an evidentiary hearing is mandatory when a habeas petitioner has not received a state court hearing and: (1) he alleges facts which, if proved, would entitle him to relief, and (2) the record reveals a genuine factual dispute as to these alleged facts. The Court specifically enumerated six circumstances where a federal habeas court must grant an evidentiary hearing to a habeas petitioner. Petitioner here claims that two of those circumstances are present: (1) the State factfinding procedures were not adequate to afford a full and fair hearing; and (2) the State trier of fact did not afford the habeas applicant a full and fair fact hearing.

The Court finds that Petitioner has not received a meaningful State court hearing on the issue of counsel's effectiveness and that ineffective assistance of counsel, if established, would warrant reversal of Petitioner's conviction and sentence. However, the record in this case does not reveal a genuine factual dispute concerning counsel's effectiveness, as required by the Townsend test for whether an evidentiary hearing is warranted.

As noted previously herein, trial counsel's decision not to pursue the issue of defendant's competency to stand trial was clearly professionally reasonable under the circumstances. Petitioner's claim for an evidentiary hearing on this issue is therefore denied.

Petitioner has amended the petition to further allege that trial counsel was ineffective for failing to adequately investigate, develop and present evidence in mitigation in the sentencing phase of his trial. Petitioner's contention is that evidence of his mental disorder should have been presented during this phase.

The record reveals that Petitioner's trial counsel put on the stand Dr. Sullwold and Petitioner's former wife and parents, and all testified in relation to Petitioner's mental state and emotional disturbance. The trial court, at the close of the sentencing hearing, did find as a mitigating circumstance that the capital felony was committed while Petitioner was under the influence of extreme mental or emotional disturbance. Additional mitigating circumstances relating to Petitioner's age and lack of prior criminal activity were also argued and established.

This Court is convinced that the test of Strickland for reasonably effective assistance as guaranteed by the Sixth Amendment is satisfied.

Having considered all issues raised by the Petitioner and having determined that none is sufficient to warrant this Court's issuance of its writ of habeas corpus, it is accordingly

ORDERED and ADJUDGED as follows:

1. That the Petition for Writ of Habeas Corpus filed by AUBREY DENNIS ADAMS on September 14, 1984 be and the same is hereby DENIED;

2. Petitioner's motion for stay of execution be and the same is hereby DENIED; and

3. The Clerk of this Court shall enter judgment dismissing this action.

DONE and ORDERED in Chambers at Jacksonville, Florida this 18 day of September, 1984 at 2:48 A.M. o'clock.

Wm. H. Moore II
UNITED STATES DISTRICT JUDGE

Copies to:

All counsel of record

I certify the foregoing to be a true and correct copy of the original.
DONALD M. CIERAMOND, Clerk
United States District Court
Middle District of Florida
By: Dargell W. Lewson
Deputy Clerk

Latimer, 511 F.2d 498, 503 (10th Cir.1975). The court sustained the defense's objection. Devous now contends that this was not enough, that the court should have granted a mistrial *sua sponte*. We disagree. Taken in context, the prosecutor was replying to the defense's insinuation in closing argument that Velikaneye should not have been given immunity, R.Supp. Vol. III at 536, by explaining that she had been given immunity because there was sufficient corroborating evidence to support what she was saying. *Cf. United States v. Young*, *supra*. The prosecutor's remarks about what he believed were on the border. Defense counsel's objection to those remarks was sustained. The trial court's action was proper and sufficient to avoid prejudice to the defendant.

[9] Devous contends that the court's instructions to the jury were confusing and incomplete, in that the court did not instruct the jury that the defendant's distribution of Demerol was "outside the course of his professional practice." This contention is incorrect; the court did instruct on this element by reference to the indictment, the full text of which was read to the jury as part of the instructions. R.Supp. Vol. IV at 551. Furthermore, the instructions, although complex, were not unduly confusing. We hold that the instructions were complete and adequately covered each element of the crimes charged.

[10, 11] Devous also contends that the evidence was insufficient to convict him on any of the three counts and that the trial court therefore erred in failing to grant his motions for acquittal. The substance of this contention is that the prosecution did not establish that the Demerol involved was not being used for legitimate medical purposes, or that it had been obtained fraudulently. We disagree. There was ample evidence presented that the Demerol was being used for recreational purposes, and that the final purchase of 40 bottles was effected through a false representation that the drugs were needed for a visiting doctor from Salt Lake City.

AFFIRMED.

Aubrey Dennis ADAMS, Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, and Jim Smith, Respondents-Appellees.

No. 84-3646.

United States Court of Appeals, Eleventh Circuit.

June 17, 1985.

Habeas corpus petitioner appealed from an order of the United States District Court for the Middle District of Florida, John H. Moore, II, J., denying his petition. The Court of Appeals, Johnson, Circuit Judge, held that: (1) procedural default rule would not operate to preclude petitioner, who failed to request a competency hearing at trial or pursue a claim of incompetency on direct appeal, from pursuing claim of mental incompetency in federal habeas corpus proceeding; (2) petitioner presented insufficient evidence of mental incompetence at time of trial and sentencing to warrant evidentiary hearing; (3) record reflected certainty that conviction was for premeditated murder, and not felony-murder, which was not alleged but was referred to early in instructions as part of what were, in essence, statutory definitions; (4) failure to instruct as to elements of underlying felonies after instructing on felony-murder was not so prejudicial that the penalty ultimately imposed violated petitioner's due process rights; (5) trial court was not precluded from finding aggravating factor of murder committed for purpose of avoiding arrest by also finding as an aggravating factor that murder was committed during commission of or attempt to commit rape or kidnapping; and (6) none of claims of ineffective assistance of counsel warranted habeas corpus relief.

Affirmed.

1. Habeas Corpus ⇐45.3(1.40)

Procedural default rule would not operate to preclude defendant who failed to

request a competency hearing at trial or pursue a claim of incompetency on direct appeal from pursuing claim of mental incompetency in federal habeas corpus proceeding.

2. Mental Health ⇐434

Legal test for mental competency is whether, at time of trial and sentencing, defendant had sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether defendant had a rational as well as factual understanding of proceedings against him.

3. Constitutional Law ⇐268.2(2)

As a matter of procedural due process, a criminal defendant is entitled to an evidentiary hearing on claim of mental incompetency if he presents clear and convincing evidence to create a real, substantial and legitimate doubt as to his mental capacity to meaningfully participate and cooperate with counsel.

4. Habeas Corpus ⇐85.5(2)

Failure to raise mental competency issue during trial or sentencing was persuasive evidence that habeas petitioner's mental competence was not in doubt and, therefore, that he was not entitled to an evidentiary hearing.

5. Criminal Law ⇐625

Defense attorney's statement in presentencing report to effect that habeas petitioner was unable to recall details of killing did not serve to raise a real, substantial, and legitimate doubt as to petitioner's mental competency to stand trial which would entitle him to an evidentiary hearing, since it would be possible for a defendant to have no recall of his involvement in a crime and yet fairly understand proceedings against him and cooperate meaningfully with his defense.

6. Habeas Corpus ⇐90.2(5)

Recent psychological evaluation diagnosing habeas corpus petitioner as suffering from catathymic amnesia failed to raise real, substantial, and legitimate doubt as to petitioner's competency to stand trial and be sentenced, and thus did not entitle petitioner to an evidentiary hearing, since the new psychological evaluation reflected only petitioner's present condition and shed little light on his condition at time of trial and sentencing.

7. Homicide ⇐345

Record reflected certainty that conviction on general jury verdict simply finding defendant guilty of first-degree murder was for premeditated murder, and not for felony-murder, which was never alleged but was referred to early in instructions as part of what were, in essence, statutory definitions.

8. Homicide ⇐340(4)

Where record reflected certainty that conviction was for premeditated murder and not felony-murder, instruction that was incomplete in failing to define elements of underlying felonies following instruction on felony-murder did not deprive defendant of his right to have a fully informed jury decide guilt or innocence.

9. Constitutional Law ⇐270(1)

Jury instruction at sentencing phase of capital trial that was incomplete for failure to define elements of felonies listed as possible aggravating factors to be considered in reaching an advisory verdict did not so infect entire sentencing proceeding that penalty ultimately imposed violated defendant's due process rights.

10. Criminal Law ⇐992

Under Florida law, a jury's advisory verdict recommending life imprisonment in a capital prosecution establishes an important set of parameters beyond which trial judge may exercise his discretion in reaching a sentence of death only if facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ.

11. Homicide ⇐354

Where underlying felony of kidnapping involved transportation of victim from one location to another and entailed commission of deliberate acts to avoid detection that resulted in victim's death, trial court was not precluded from finding as an aggravating factor that defendant had killed victim

in order to avoid or prevent his arrest by also finding as an aggravating factor that victim was killed during commission of kidnapping.

12. Habeas Corpus ⇐25.1(6)

None of petitioner's claims of ineffective assistance of counsel, including, inter alia, failure to adequately investigate competency to stand trial or be sentenced, failure to object to trial instruction on lesser degrees of homicide for which no evidence had been presented, failure to present in mitigation evidence of mental condition at time of murder and failure to object to sentencing instructions, involved both professional conduct that was unreasonable under circumstances and reasonable probability that, but for challenged conduct, result would have been different, warranting denial of habeas corpus relief. U.S.C.A. Const.Amend. 6.

Kenneth R. Hart, Timothy B. Elliott, Ausley, McMullen, McGehee, Carothers & Proctor, Tallahassee, Fla., for petitioner-appellant.

Margene A. Roper, Asst. Atty. Gen., Port Orange, Fla., for respondents-appellees.

Appeal from the United States District Court for the Middle District of Florida.

Before RONEY, FAY and JOHNSON, Circuit Judges.

JOHNSON, Circuit Judge:

Petitioner, Aubrey Dennis Adams, was convicted of first degree murder in a Florida court in 1978. Following the jury's recommendation, the trial judge imposed the death sentence. Direct appeals proved unsuccessful, *Adams v. State*, 412 So.2d 850 (Fla.), *cert. denied*, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982), as have subsequent petitions in state court seeking post-conviction and habeas corpus relief. *Adams v. State*, 456 So.2d 888 (Fla.1984). This is an appeal from the district court's denial of the petitioner's federal habeas petition. *Adams v. Wainwright*, No. 84-170-Civ-Oc-16 (M.D.Fla. Sept. 18, 1984). We affirm.

I. FACTS

In March 1978, the body of an eight year old girl was discovered in a remote wooded area near Ocala, Florida. The petitioner's conviction for the young girl's murder was based on circumstantial evidence and incriminating statements he made to investigating officers. Physical evidence found near the body was similar to evidence found in the petitioner's home and automobile. In a written statement, the petitioner admitted that he had offered the victim a ride home from school, she had accepted, and he had driven in another direction. The petitioner remembered "being stopped somewhere and she was screaming and I put my hand over her mouth and she quit breathing." Verbally, the petitioner admitted removing the victim's clothes, using rope to tie her hands, and placing plastic bags over her body. When asked if he had any type of sexual relations with the victim, the petitioner said he thought he had tried but could not do it or could not bring himself to do it. The testimony of the officers indicates that the petitioner had difficulty remembering the details of the killing when questioned.

II. ISSUES AND DISCUSSION

A. The Petitioner's Mental Competence to Stand Trial and be Sentenced.

The trial court granted a pretrial motion by the defense for an order allowing a private psychiatrist to enter the petitioner's prison and examine him. In a subsequent pretrial hearing on the State's motion for a separate psychological examination, the petitioner's attorney asserted that he knew of no evidence having been presented to the court to suggest incompetency and that, absent such evidence, it would be improper for the court to order an additional examination. The State's motion was denied. The petitioner did not claim mental incompetency or allege an insanity defense at trial. In the presentence report, however, the defense attorney is attributed with the statement that the petitioner had been unable to recall the details of the crime and this had impaired the petitioner's assistance in his defense. Moreover, the petitioner now proffers a psychological evalua-

tion made after his conviction which purports to demonstrate that he suffers from catathymic amnesia, a mental disorder which prevents him from recalling traumatic experiences. Based on this recent evaluation, the petitioner contends that in 1978 he was incompetent to stand trial and be sentenced.

On motion for post-conviction relief, the Supreme Court of Florida summarily held that the petitioner's claim of mental incompetence was procedurally barred because he had failed to argue the claim in direct appeals to the state courts. *Adams v. State*, *supra*, 456 So.2d at 890, *citing McCrae v. State*, 437 So.2d 1388 (Fla.1983). No evidentiary hearing was held in state court to determine whether the petitioner was mentally incompetent at the time of trial and sentencing.

The district court below similarly denied the petitioner's claim of incompetency, (1) citing procedural default or waiver due to his failure to argue this claim before the state courts on direct appeal, and (2) finding, in any event, that insufficient evidence had been presented to raise a legitimate doubt as to the petitioner's mental competence and thereby establish his entitlement to a competency hearing. Again, no evidentiary hearing was held. Instead, the district court relied solely on the trial transcript and other documentary evidence.

[1] 1. *Procedural Default.* Binding precedent fully supports the petitioner's contention that the procedural default rule of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), does not operate to preclude a defendant who failed to request a competency hearing at trial or pursue a claim of incompetency on direct appeal from contesting his competency to stand trial and be sentenced through post-conviction proceedings. *See Zapata v. Estelle*, 588 F.2d 1017, 1021 (5th Cir.1979); *Nathaniel v. Estelle*, 493 F.2d 794, 798 (5th Cir.1974); *Bruce v. Estelle*, 483 F.2d 1031, 1037 (5th Cir.1973). Indeed, as the Supreme Court stated in *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." *Id.* at 384, 86 S.Ct. at 841; *Zapata v. Estelle*, *supra*, 588 F.2d at 1021; *Bruce v. Estelle*, *supra*, 483 F.2d at 1037. Therefore, the district court below erred in holding that the petitioner was procedurally barred from pursuing a claim of mental incompetency in a federal habeas corpus proceeding.

The district court's opinion attempts to distinguish *Pate v. Robinson* on factual grounds, noting that Robinson's sanity had been "very much at issue" throughout the criminal proceedings against him, while the petitioner in this case considered but rejected proffering an insanity plea. This factual difference does exist, but the district court's reasoning pretermits the initial conclusion in *Pate v. Robinson* and ignores subsequent decisions in this Circuit. The Supreme Court in *Pate v. Robinson* first reasoned that one who is incompetent cannot waive his right to a competency hearing. The secondary basis for its holding was that, "[i]n any event," waiver had not actually occurred because Robinson had made his sanity an issue throughout his trial. *Pate v. Robinson*, *supra*, 383 U.S. at 384, 86 S.Ct. at 841. Later decisions in this Circuit have applied the initial rationale of *Pate v. Robinson* in such a manner as to obviate the need for any inquiry into whether a convicted defendant who is alleging mental incompetency actually waived his right to a competency hearing at the time of his trial. These decisions have squarely held that waiver cannot occur. *See Zapata v. Estelle*, *supra*, 588 F.2d at 1021; *Nathaniel v. Estelle*, *supra*, 493 F.2d at 798; *Bruce v. Estelle*, *supra*, 483 F.2d at 1037.

[2, 3] 2. *Evidence of Mental Incompetence.* Although the petitioner is not procedurally barred in these habeas proceedings from challenging his mental competency, he is not automatically entitled to a hearing on this claim.[1] The legal test for

1. Nor is the petitioner automatically entitled to a hearing on his claim that his attorney rendered ineffective assistance by not fully investi-

mental competency is whether, at the time of trial and sentencing, the petitioner had "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and whether he had "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960). As a matter of procedural due process, a criminal defendant is entitled to an evidentiary hearing on his claim of incompetency if he presents clear and convincing evidence to create a "real, substantial and legitimate doubt as to [his] mental capacity ... to meaningfully participate and cooperate with counsel...." *Bruce v. Estelle*, *supra*, 483 F.2d at 1043; *see also Zapata v. Estelle*, *supra*, 588 F.2d at 1021-22; *Nathaniel v. Estelle*, *supra*, 493 F.2d at 798. The standard of proof is high. The facts must "positively, unequivocally and clearly generate" the legitimate doubt. *Bruce v. Estelle*, *supra*, 483 F.2d at 1043; *see also Pride v. Estelle*, 649 F.2d 324, 326 (5th Cir.1981) (requiring "more than a showing by a preponderance of the evidence" that the petitioner might have been incompetent at the time of the state trial).

The district court below found that the petitioner had not presented sufficient evidence to create a "real, substantial, and legitimate doubt" as to his mental competence to stand trial and be sentenced. Therefore, he was not entitled to an evidentiary hearing. In reaching this conclusion, the district court considered the trial transcript and other supporting documents. No live testimony was taken. Our review of findings based on such a record is, nevertheless, constrained by the usual strictures of the clearly erroneous standard. *Anderson v. Bessemer City*, — U.S. —, —, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518 (1985); *see Dothan Coca-Cola Bottling Co. v. United States*, 745 F.2d 1400, 1402-04 (11th Cir.1984) (choosing the clearly erroneous standard where the lower court considered only transcript of prior trial and other documentary evidence). Under the proper standard of review, we agree with the finding of the district court, though not with its reasoning entirely.

[4] In finding that the petitioner had failed to raise a real, substantial, and legitimate doubt as to his competency to stand trial, the district court noted the statement made by the petitioner's attorney at the pretrial hearing that he then knew of no evidence to suggest the petitioner was incompetent. This statement was made, but its importance is limited by the context. As of the date of the hearing, the psychological testing of the petitioner was not sufficiently complete for the attorney to conclude that no claim of incompetency would be raised. Indeed, the transcript of the hearing clearly reflects that the attorney had not yet determined whether raising such a claim would be appropriate.[2] Therefore, the statement itself should be given little weight in deciding whether a doubt as to the petitioner's competency exists. By contrast, it is highly significant that the petitioner's counsel did not later claim during trial or sentencing that the petitioner was in fact incompetent. This failure to raise the competency issue is persuasive evidence that the petitioner's mental competence was not in doubt and therefore he is not entitled to an evidentiary hearing. *E.g., Reese v. Wainwright*, 600 F.2d 1085, 1092 (5th Cir.), *cert. denied*, 444 U.S. 983, 100 S.Ct. 487, 62 L.Ed.2d 410 (1979).

[5] The district court also criticized the "self-serving" nature of the statement attributed to the petitioner's attorney in the presentencing report to the effect that the petitioner's ability to assist with his defense had been limited because he could not recall the details of the killing. We are not persuaded by this conclusory line of reasoning. More important to our decision to affirm the district court's finding is the

gating his competency. *See infra* note 14 and accompanying text.

2. The petitioner's attorney stated at the hearing that the petitioner's family intended to engage a psychiatrist "to examine [the petitioner] prior to the filing of any suggestions of competency and sanity, if the same were appropriate."

limited nature of the statement itself. The presentence report summarizes the attorney's remarks: "Prior [to] and during the trial, Dennis Adams could not remember and therefore could not provide information concerning the killing that would assist with his defense." The district court recognized in a footnote, and we agree, that this statement is quite different from a contention that the petitioner lacked the "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and lacked "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, *supra*, 362 U.S. at 402, 80 S.Ct. at 789. While a defendant's inability to remember his participation in a crime may have some bearing on whether he is mentally incompetent, it is possible for a defendant to have no recall of his involvement in a crime and yet fully understand the proceedings against him and cooperate meaningfully with his attorney in his defense. The right not to be tried and sentenced unless mentally competent does not extend so far as to ensure total recall.

[6] Finally, the district court below discounted the recent psychological evaluation diagnosing the petitioner as suffering from catathymic amnesia. As had the Florida Supreme Court on the petitioner's motion for post-conviction relief, the district court concluded that the new psychological evaluation reflected only the petitioner's present condition and shed little light on his condition at the time of trial and sentencing. On appeal, the petitioner argues that the evaluation is not limited in analysis to his present condition, but we find nothing in the record to support this contention. The evaluation does not even appear to have been made a part of the record on appeal, and thus we are unable to consider its content. We cannot say, then, that the district court's finding is erroneous. Having failed to raise a real, substantial, and legitimate doubt as to his competency to stand trial and be sentenced, the petitioner is not entitled to an evidentiary hearing on this claim.

B. The Felony-Murder Instruction at the Guilt-Innocence Phase.

The indictment charged the petitioner with premeditated murder. Felony murder was not alleged. However, the verbal charge given the jury during the guilt-innocence proceedings listed, as "murder in the first degree," both premeditated murder and felony murder, with the latter being defined as killing during the commission of, or an attempt to commit, "rape,[3] . . . abominable and detestable crime against nature or kidnapping. . . ." The Florida statute prohibiting abominable and detestable crimes against nature had been declared unconstitutional before the petitioner's trial. *Franklin v. State*, 257 So.2d 21 (Fla. 1971). The jury returned a general verdict finding the petitioner guilty of murder in the first degree, without specifying whether the crime was premeditated or whether it simply occurred while the petitioner was committing or attempting to commit one of the enumerated felonies.

In *Stromberg v. California*, 283 U.S. 359, 368, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931), the Supreme Court held that a conviction cannot be upheld if (1) the jury was instructed that a guilty verdict could be returned with respect to any one of several listed grounds, (2) it is impossible to determine from the record on which ground the jury based the conviction, and (3) one of the listed grounds was constitutionally invalid. Citing *Stromberg*, the petitioner claims that the trial court's reference to an invalid crime, when coupled with the jury's general verdict, necessitates a reversal.[4]

3. The reference to rape here was in error, since the crime did not exist under Florida law. Had the felony-murder instruction been warranted in the first instance, the proper instruction would have referenced and defined sexual battery. *See Adams v. State*, *supra*, 412 So.2d at 852. However, because we hold that the jury considered and found the petitioner guilty only of premeditated murder, this error in the felony-murder definition was harmless.

4. The petitioner further claims that his attorney's failure to object to the trial court's instructions and the general form of the verdict constitutes ineffective assistance of counsel. Since we hold the substantive *Stromberg* claim to be with

The Florida Supreme Court rejected this claim. Without citing *Stromberg*, the court engaged in a determination of whether the evidence was sufficient to support a finding of premeditated murder. The court held that, "[a]lthough an erroneous or uninvited felony murder instruction was given, the evidence of premeditation was sufficient to render the erroneous instruction harmless." *Adams v. State*, *supra*, 412 So.2d at 853.

The Florida Supreme Court's approach to deciding the petitioner's *Stromberg* claim was incorrect. The proper approach is to examine only the trial court's instructions and the jury's verdict, not the sufficiency of the evidence to support the verdict. *Stromberg* does not suggest a harmless error standard based on overwhelming evidence of guilt under the valid portion of the jury charge. Rather, *Stromberg* states simply that if it is "impossible" to say on which ground the verdict rests, the conviction must be reversed. *Stromberg v. California*, *supra*, 283 U.S. at 368, 51 S.Ct. at 535.

The district court below reiterated the Florida court's conclusion as to the sufficiency of the evidence before approaching this claim correctly by examining the jury instructions and the closing arguments made at trial and asking whether, under the circumstances, the jury could only have considered and found premeditated murder. The district court concluded that the record left no uncertainty as to the ground on which the verdict rested. That ground was premeditated murder. After reviewing the transcript of the trial, particularly the closing arguments at the guilt-innocence phase and the trial court's instructions, we agree.

[7] The trial court's reference to the capital felony of killing during the commission of or an attempt to commit rape, a crime against nature, or kidnapping as murder in the first degree appears early in the instructions as part of what were, in essence, statutory definitions.[8] The actual

out merit, the attorney's failure to object cannot be held to constitute ineffective assistance.

8. The trial court's instructions state, in relevant part:

> The Defendant, Aubrey Dennis Adams, Jr., is charged with the crime of first degree murder in that on January the 23rd, 1978, in Marion County, Florida, he did unlawfully, from a premeditated design to effect the death of Trisa Gail Thornley ... kill and murder Trisa Gail Thornley ... in violation of Florida Statute 782.04.
>
> The charge of premeditated murder includes the lesser charges of: One, second degree murder; two, third degree murder; and, three, manslaughter.
>
> The Defendant has entered his plea of not guilty. The effect of this plea is to require the State to prove each material allegation of the Indictment beyond and to the exclusion of every reasonable doubt before the Defendant may be found guilty.
>
> The killing of one human being by another is called homicide. Every homicide falls within one of these four classes: One, justifiable homicide; two, excusable homicide; three, murder in the first, second or third degree; and, four, manslaughter.
>
> The circumstances of each case determine whether a homicide is justifiable, excusable, murder or manslaughter.
>
> Justifiable homicide and excusable homicide are lawful. Murder and manslaughter are unlawful and constitute violations of the criminal laws.
>
> The essential elements of unlawful homicide, together with other matters that must be proved beyond and to the exclusion of every reasonable doubt before there can be a conviction in this case, are as follows: One, Trisa Gail Thornley is, in fact, dead; two, such death was caused by the criminal act or agency of another; and, three, the death was caused by the Defendant, Aubrey Dennis Adams, Jr.
>
> These four classes of homicide must now be defined to you so that you can properly understand them.
>
> The first class that I made reference to: The killing of a human being is justifiable homicide and lawful when ...
>
> The second class: Excusable homicide is ...
>
> Homicide is excusable and lawful if it is committed by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used ...
>
> A sudden and sufficient provocation is ...
>
> The heat of passion is ...
>
> A dangerous weapon is ...
>
> The third class: Murder in the first degree, is the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being.
>
> A premeditated design to kill is ...
>
> The question of premeditated design is a question of fact to be determined by the Jury.

and controlling charge came later in the instructions, when the trial court told the jurors that, if the elements of homicide were found, their next task would be to determine its degree. At this point, premeditated murder was the only killing stated to constitute murder in the first degree.[6] Therefore, the jurors were actually instructed to consider only premeditated murder as murder in the first degree. That their consideration was so limited is further evidenced by three significant facts: (1) a felony-murder theory was not advanced at trial, (2) the closing arguments of both the State and the petitioner focused on premeditation to the complete exclusion of felony murder,[7] and (3) the indictment charging only premeditated murder was submitted to the jurors along with all of the evidence for use in their deliberations. Under these circumstances, it is not impossible to determine on which ground the petitioner's conviction for first degree murder rests. The record reflects certainty that the conviction was for premeditated murder and not felony murder.

C. The Failure to Instruct as to the Elements of Underlying Felonies.

[8] After instructing the jury that killing during the commission of, or an attempt to commit, rape or kidnapping constituted murder in the first degree, the trial court failed to define the elements of these underlying felonies. The petitioner here contends that the incomplete instruction so infected the guilt-innocence phase of his trial as to violate due process, in that it deprived him of the right to have the jury decide whether each element of the crime had been proved beyond a reasonable doubt.[8] *See Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736, 52 L.Ed.2d 203 (1977); *cf. Glenn v. Dallman*, 686 F.2d

> The killing of a human being in committing, or attempting to commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping is murder in the first degree, even though there is no premeditated design or intent to kill.
>
> If a person kills another while he is trying to do or commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping, or while escaping from the immediate scene of such crime, the killing is in the perpetration of or in the attempt to perpetrate such arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping and is murder in the first degree.

6. The listed felonies were only mentioned by reference in order to distinguish all other felonies as relevant to a finding of murder in the *third* degree:

> To summarize: The essential elements of an unlawful homicide which must be proved beyond a reasonable doubt in this case before there can be a conviction of any offense are as follows. One, that Trisa Gail Thornley is, in fact, dead; two, that the killing was wrongful and by the means stated in the Indictment; three, that Trisa Gail Thornley was killed by the Defendant; and, four, that the killing was neither justifiable or [sic] excusable homicide.
>
> If the elements are established, then it will be necessary for you to determine the degree of the unlawful homicide.
>
> *If the Defendant, in killing the deceased, acted from a premeditated design to effect the death of the deceased, or some other human being, he should be found guilty of murder in the first degree.* (emphasis added)
>
> If the killing was not from a premeditated design to effect the death of any human being, but was in the perpetration of an act imminently dangerous to another, evincing a depraved mind, regardless of human life, the Defendant should be found guilty of murder in the second degree.
>
> If the killing took place while the Defendant was engaged in the commission of a felony other than arson, *rape*, robbery, burglary, the *abominable and detestable crime against nature* or *kidnapping*, the Defendant should be found guilty of murder in the *third* degree. (emphasis added).
>
> If the killing was by the act, procurement or culpable negligence of the Defendant and was not murder in any degree or justifiable or excusable homicide, the Defendant should be found guilty of manslaughter.
>
> Of course, if any one of the essential elements of any unlawful homicide has not been proved beyond a reasonable doubt, the Defendant should be found not guilty.

7. Both the prosecuting attorney and the petitioner's attorney equated first degree murder with premeditated murder for purposes of this trial.

8. The petitioner also raises an ineffective assistance of counsel claim based on his trial attorney's failure to object to the incomplete charge. Since we hold the underlying claim to be without merit, the attorney's failure to object cannot constitute ineffective assistance.

418 (6th Cir.1982) (vacating a conviction where the trial court had omitted in its instructions an essential element of the only crime charged, harmless error rule held inapplicable). However, since we have already determined that the jury considered and found only premeditated murder, given the particular circumstances of this trial, the incomplete instruction did not deprive the petitioner of his right to have a fully informed jury decide guilt or innocence. The petitioner does not claim that the trial court improperly instructed the jury as to the necessary elements of proof for a finding of premeditated murder. Failing to inform the jury as to the elements of the felonies incorrectly mentioned but not charged in the indictment and not considered or found by the jury does not constitute reversible error.

An analogous claim is raised with respect to the trial court's instructions at the sentencing phase of the petitioner's trial. The instructions listed the statutory aggravating factors that the jury could properly consider in reaching an advisory verdict. One of the three aggravating factors was that the killing had occurred during the commission of, or an attempt to commit, rape or kidnapping. Again, however, the trial court did not define the elements of these felonies. The jury's advisory verdict recommended a sentence of death but did not specify which aggravating factor(s) a majority of the jurors found to exist beyond a reasonable doubt. The trial court later specifically found that three aggravating factors had been proved: (1) the murder had occurred during the commission of, or an attempt to commit, rape or kidnapping, (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest, and (3) the murder was especially heinous, atrocious, or cruel. *See* Fla. Stat. §§ 921.141(5)(d), (e), (h).

[9] We hold that the incomplete jury instruction did not so infect the entire sentencing proceeding that the penalty ultimately imposed violates the petitioner's due process rights. *See Henderson v. Kibbe, supra*, 431 U.S. at 154–55, 97 S.Ct. at 1736–37. However, we reject as a rationale for this holding the broad notion that the merely advisory role of the sentencing jury under Florida law renders *any* given error in a sentencing proceeding nonconstitutional in stature. This approach was recently noted but appropriately not followed by a panel of this Court in *Proffitt v. Wainwright*, 756 F.2d 1500, 1502 (11th Cir.1985) (citing *Spaziano v. Florida*, — U.S. —, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984)).

[10] The jury's role in an advisory sentencing proceeding is critical. A verdict recommending life imprisonment establishes an important set of parameters beyond which the trial judge may exercise his discretion in reaching a sentence of death only if "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975). Every error committed before the jury at a sentencing proceeding will have some *conceivable* effect on the jury's verdict and thus may affect the jury's determination of the guiding parameters for sentencing in the case. Every error in instruction which makes it less likely that the jury will recommend a life sentence to some degree deprives the defendant of the protections afforded by the presumption of correctness that attaches to a jury's verdict recommending life imprisonment. There may be a case in which a substantively incorrect instruction will mislead the jury to such an extent that the parameters created by the jury's verdict are so far off their proper mark that the instruction alone justifies reversal. An erroneous instruction may also provide convincing evidence that the trial judge himself misunderstood or misapplied the law when he later actually found and balanced aggravating and mitigating factors.

Not every error in instruction, however, will be so prejudicial as to require resentencing. An *incomplete* instruction is less likely to prejudice the defendant than one which is substantively incorrect. *See Henderson v. Kibbe, supra*, 431 U.S. at 155, 97 S.Ct. at 1737. The latter misstates the applicable law; the former is consistent with the applicable law but simply fails to

set it forth in full detail. Moreover, a claim of prejudice is particularly remote where the defendant did not object to the instruction's lack of completeness when the opportunity arose. *Id.* Such is the status of the petitioner's claim here. The jury instruction at sentencing was not substantively erroneous, just incomplete. The petitioner's counsel did not object or move for further instructions. The evidence fully supports the trial court's finding that the murder occurred during the commission of, or an attempt to commit, rape and kidnapping. Under these circumstances, the possibility that the jury would have reached a different verdict and thereby altered the sentencing parameters "is too speculative to justify the conclusion that constitutional error was committed." *Id.* at 157, 97 S.Ct. at 1738; *cf. Westbrook v. Zant*, 704 F.2d 1487, 1501 (11th Cir.1983) (Under Georgia law, and "[u]nder the facts in this case, the trial court was required to do no more regarding the applicable statutory aggravating factors than to repeat the exact statutory language.").

D. The Aggravating Factor of Murder Committed for the Purpose of Avoiding Arrest.

As noted previously, one of the three statutory aggravating factors found by the trial court to justify imposing the death penalty was that the petitioner had killed the victim in order to avoid or prevent his arrest. *See* Fla.Stat. § 921.141(5)(e). The facts enumerated by the trial court in support of this finding were: (1) actual or attempted kidnapping and rape had been proven, implying that the petitioner had reason to fear arrest, and (2) the murder prevented the victim from later identifying the petitioner. In affirming the sentence, the Florida Supreme Court added: (1) the victim knew the petitioner and could have identified him if permitted to live, and (2) the petitioner had hidden the victim's body. *Adams v. State*, *supra*, 412 So.2d at 856. The district court below concluded: "The aggravating factor of avoiding arrest was not found in this case simply because the victim's body was hidden;[9] rather, the evidence supports the finding that death was preceded by kidnapping and rape and that the victim was murdered to prevent [the petitioner's] discovery and conviction for these felonies." *Adams v. Wainwright*, *supra*, No. 84-170-Civ.-Oc-16, Op. at 10-11.

Citing a recent Florida Supreme Court decision, *Doyle v. State*, 460 So.2d 353 (Fla. 1984), in which the court reversed a finding of this same aggravating factor in a rape-murder context, the petitioner asserts that no meaningful basis exists for distinguishing between cases involving a real avoidance motive for killing and cases not involving this motive. Without such a basis, argues the petitioner, the imposition of the death penalty in the present case, to the extent it is based on this aggravating factor, is arbitrary and hence unconstitutional. *See Godfrey v. Georgia*, 446 U.S. 420, 427-28, 100 S.Ct. 1759, 1764-65, 64 L.Ed.2d 398 (1980); *Gregg v. Georgia*, 428 U.S. 153, 188, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976).

Like this case, *Doyle* involved sexual battery and murder of a victim who knew the defendant. The trial court found as aggravating factors that the murder was committed both in the course of sexual battery, *see* Fla.Stat. § 921.141(5)(d), and in order to avoid lawful arrest, *see* Fla.Stat. § 921.141(5)(e). In holding that the State had not proved the latter aggravating factor beyond a reasonable doubt, the Florida Supreme Court stated in *Doyle*: "It is a tragic reality that the murder of a rape victim is all too frequently the culmination of the same hostile-aggressive impulses which triggered the initial attack and not a reasoned act motivated primarily by the desire

9. The petitioner's attempt to conceal the victim's body by placing it in plastic bags and depositing it in a remote area, a fact the Florida Supreme Court relied upon in affirming the trial court's finding, is too ambiguous to comprise a part of our rationale for holding that the State proved beyond a reasonable doubt that the petitioner committed the murder in order to avoid detection. Concealment of the body is as much evidence of an intent to avoid detection of the murder as it is evidence of an intent to avoid detection of actual or attempted rape and kidnapping.

to avoid detection." *Doyle v. State*, *supra*, 460 So.2d at 358. Based on this statement, the petitioner argues that the victim's death in this case resulted from an impulsive manual strangulation which was an integral part of the attempted rape of the victim and not a reasoned act motivated by a desire to avoid detection and arrest.

In essence, the petitioner's argument is that by finding the aggravating factor, killing during the commission of actual or attempted rape, a trial court is prevented from finding as an additional aggravating factor that the killing was motivated by a desire to avoid detection and prevent arrest. *Doyle*, however, did not hold that these two aggravating factors were mutually exclusive in every case involving both murder and rape. Indeed, the *Doyle* court implied otherwise by holding that, based on the facts in the record of that case, the State simply had not proven an avoidance motive beyond a reasonable doubt. The *Doyle* court rejected the State's attempt to prove this factor by drawing weak inferences from the victim's ability to identify the defendant as her rapist and from the likelihood that a five-year suspended sentence of the defendant for a prior offense would be reimposed if he were arrested and convicted of rape.[10] Thus, as we interpret *Doyle*, proof of murder while committing actual or attempted rape will not invariably preclude a finding that the defendant acted on a premeditated desire to kill in order to avoid detection and prevent arrest. The two aggravating factors can co-exist if both are proven beyond a reasonable doubt. Proof that the petitioner's reasoned acts in this case were motivated by a desire to avoid detection does not require an unacceptable reliance on inferences or assumptions. The petitioner's own written confession states that he put his hand over the victim's mouth to silence her screaming, and she quit breathing.

[11] Moreover, unlike *Doyle*, the present case involves a charge of kidnapping as well as rape. The type of hostile-aggressive impulses associated with rape are not as readily implicated in a kidnapping case. The rape and murder in *Doyle* occurred as part of a single incident of impulsive violence committed at one location. Under these circumstances, the court was appropriately skeptical of the State's attempt to infer an avoidance motive for killing from the simple fact that a rape had occurred. By contrast, the kidnapping here involved transportation of the victim from one location to another and entailed the commission of deliberate acts to avoid detection.[11] These acts resulted in the victim's death. Killing during the commission of kidnapping and killing motivated by a desire to avoid detection of the kidnapping can comprise separate aggravating factors in the same case.[12] *See, e.g., Stevens v.*

10. *See also Rivers v. State*, 458 So.2d 762, 765 (Fla.1984) (requiring "direct evidence as to motive or at least very strong inference from the circumstances"); *Menendez v. State*, 368 So.2d 1278, 1282 (Fla.1979) (That murder weapon was fitted with a silencer, the purpose of which was to minimize detection, did not clearly show the dominant motive for killing was to avoid arrest by eliminating a witness to a robbery; where events preceding the actual killing are unknown, court will not assume defendant's motive; the burden was on the state to prove it.).

11. The jury verdict at the guilt-innocence phase of the trial is consistent with this conclusion since, as we have already held, the verdict rested solely on the jury's finding that the petitioner had murdered the victim in a premeditated fashion. *Cf. Rivers v. State*, *supra*, 458 So.2d at 765 (fact that jury found defendant guilty of felony murder, not premeditated murder, supported reversal of trial court's finding that the murder was committed for the purpose of avoiding lawful arrest).

12. We do not suggest, however, that in every case in which the State alleges and proves kidnapping in addition to rape the trial court can mechanically find, as an aggravating factor, killing in order to avoid detection and prevent arrest. Under a literal reading of Florida's criminal statutes, sexual battery will nearly always entail at least the possibility of a kidnapping charge. *See* Fla.Stat. § 787.01(1)(a)(2) (defining "kidnapping" to include forcibly confining another person against his or her will with intent to commit a felony); Fla.Stat. § 794.011 (defining sexual battery and establishing it as a felony). Yet proof of kidnapping in a sexual battery case will not necessarily enable the State to avoid the effect of the Florida Supreme Court's holding in *Doyle*. The evidence must also show conclusively, as it did here, that the defendant did not kill as the result of a single

State, 419 So.2d 1058, 1064 (Fla.1982); *Card v. State*, 453 So.2d 17, 24 (Fla.), *cert. denied*, — U.S. —, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984).

E. The Ineffective Assistance of Counsel Claims.

[12] Finally, the petitioner raises an array of ineffective assistance of counsel claims,[13] alleging that his attorney failed: (1) to adequately investigate and present evidence of his mental incompetency to stand trial or be sentenced; (2) to object to a jury instruction which listed lesser degrees of homicide for which no evidence had been presented; (3) to develop and present in mitigation evidence of his mental condition at the time of the murder; (4) to object to an instruction at sentencing which did not inform the jurors of their ability to recommend life imprisonment even though mitigating factors were outweighed by aggravating factors; (5) to object to an instruction at sentencing which listed aggravating factors not supported by any evidence; and (6) to object to an instruction at sentencing which omitted the statement that a tie vote among jurors would mandate a recommendation of life imprisonment. We have reviewed the portions of the record relevant to each of these claims, and, applying the test announced by the Supreme Court in *Strickland v. Washington*, — U.S. —, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), we affirm the denial of habeas corpus relief on this ground. None of the claims involved both professional conduct that was unreasonable under the circumstances and a reasonable probability that, but for the challenged conduct, the result of the particular proceedings would have been different. *Id.* at —, 104 S.Ct. at 2064–69, 80 L.Ed.2d at 693–99. The claims were argued in a cursory fashion in the briefs of both parties and deserve only summary treatment here.

First, neither the scope of the investigation of the petitioner's mental competency nor his attorney's decision not to pursue a claim of incompetency prejudiced the outcome of the petitioner's case.[14] Before trial, the petitioner's attorney arranged for an examination of the petitioner by a private psychiatrist for the purpose of determining whether an insanity defense could be proffered. This examination uncovered no basis for an incompetency claim. The petitioner did have difficulty remembering certain details concerning the murder, but his ability to participate meaningfully in his defense was not in such doubt that further examinations should have been undertaken. As we have already held, it appears from the record on appeal that even the petitioner's post-trial examinations fail to raise a real, substantial, and legitimate doubt as to his mental competency at the time of trial. Since the requisite doubt has not and apparently could not have then been raised, the attorney's conduct in investigating and his decision not to pursue a claim of incompetency did not result in prejudice.

Second, the attorney's failure to object to the instruction listing lesser degrees of homicide, apart from possibly being reasonable trial strategy, similarly did not prejudice the outcome of the petitioner's trial.

aggressive and impulsive sexual desire, but rather that an independent reasoned motive to avoid detection and arrest existed. Proof of this motive must be "very strong." *Riley v. State*, 366 So.2d 19, 22 (Fla.1978), *cert. denied*, 459 U.S. 1138, 103 S.Ct. 773, 74 L.Ed.2d 985 (1983); *Routly v. State*, 440 So.2d 1257, 1263 (Fla.1983).

13. See also *supra* notes 4 and 8.

14. With respect to his attorney's failure to pursue a claim of incompetency, the petitioner characterizes the ineffective assistance inquiry as purely factual, thereby hoping to obtain an evidentiary hearing as required in *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). In *Strickland v. Washington*, however, the Supreme Court described the inquiry as "a mixed question of law and fact." — U.S. at —, 104 S.Ct. at 2070, 80 L.Ed.2d at 700. Thus, the need for an evidentiary hearing does not arise unless there exists a genuine dispute as to the underlying, operative facts. Here, what the petitioner's attorney did and did not do both in investigating and deciding not to pursue an incompetency claim are not genuinely in dispute. Nor has the petitioner created in this appeal an unresolved issue of fact concerning the results of his post-trial psychological examination. The State's assertion that these results do not speak to the petitioner's competency at the time of trial and sentencing stands unrebutted.

It would certainly have been reasonable for the attorney not to object and instead to hope that, if the jury returned a guilty verdict, this verdict would be based on one of the lesser degrees of homicide listed. In any event, no prejudice resulted from the inclusion of these lesser degree crimes as part of the instruction, and hence no prejudice resulted from the attorney's failure to object. In reaching this holding, we are aware that Florida's rules of criminal procedure have been altered since the date of the petitioner's trial to require a trial court to charge only on lesser degrees that are supported by the evidence. *See In re Florida Rules of Criminal Procedure*, 403 So.2d 979 (Fla.1981); Fla.R.Crim.P. 3.490. The petitioner claims that, under the old rules, instructing on lesser degree homicides not supported by the evidence invited jurors to disregard their oaths at the guilt-innocence phase and arbitrarily find guilt of a lesser degree in some cases but not in others, depending upon whether they felt the death penalty was an inappropriate sentence. *See Roberts v. Louisiana*, 428 U.S. 325, 334–36, 96 S.Ct. 3001, 3006–07, 49 L.Ed.2d 974 (1976) (invalidating Louisiana statute that mandated death penalty whenever jury returned a guilty verdict of first degree murder). Under Florida's bifurcated procedures, however, a death sentence does not automatically follow a verdict of guilty in the first degree. As the jury in this case was expressly instructed, a separate sentencing hearing must be held and an advisory verdict rendered. Therefore, even under the old rules, jurors in Florida who were inclined to dispense mercy were not faced with the necessity of finding a lesser degree at the guilt-innocence stage in order to avoid ultimately imposing the death penalty. *See Hitchcock v. Wainwright*, 745 F.2d 1332, 1341–42 (11th Cir. 1984), *vacated*, 745 F.2d at 1348 (pending en banc review). The possibility that in another case the jury could, under similar circumstances, find a particular defendant guilty of a lesser degree of homicide and thus preclude any consideration of the death penalty for that defendant does not mean the petitioner in the present case was sentenced to death arbitrarily. The sentencing phase of the petitioner's trial afforded him full opportunity to present mitigating evidence and pleas for mercy. Nevertheless, the jury recommended the death penalty. Not having been prejudiced by the instruction, the petitioner cannot show that the outcome of his case would have been different had his attorney raised an objection.

Third, from a review of the record it is evident that the attorney did not fail to develop and present in mitigation evidence of the petitioner's mental condition at the time of the murder. As noted by the district court below, several witnesses, including a psychiatrist, testified in relation to the petitioner's state of severe emotional stress. Accordingly, the trial court found as one of three mitigating factors that the murder had been committed while the petitioner was under the influence of extreme mental or emotional disturbance. Clearly, then, the petitioner's attorney provided reasonably effective assistance of counsel on this issue.

Fourth, the attorney did not unreasonably fail to object to the instruction at sentencing on the basis that the trial court had neglected to inform the jurors of their ability to recommend life imprisonment even if mitigating factors did not outweigh aggravating factors. The petitioner claims the instructions incorrectly implied that, in order for the jury to recommend a life sentence, it would have to find mitigating factors to outweigh whatever aggravating factors it found to exist. *See Morgan v. Zant*, 743 F.2d 775, 779 (11th Cir.1984) (dicta). In actuality, however, the sentencing instructions given in this case neither expressly nor implicitly foreclosed the jury's ability to exercise mercy and recommend a life sentence even though no mitigating factors were present. To the contrary, after listing and defining the statutory aggravating factors enumerated in Florida's capital punishment statute, and *before* listing possible mitigating factors and describing their function generally, the trial court stated that the jurors were duty-bound to recommend a sentence of life imprisonment if, in their opinion, the aggra-

vating factors found were not "sufficient" to justify imposing the death penalty. That sufficient aggravating factors must exist before the death penalty could even be considered an appropriate sentence, thereby triggering the jury's consideration of mitigating evidence, was made clear by three additional references to this requirement elsewhere in the instructions. In sum, the sentencing instructions the trial court gave in this case would encompass the broadest exercise of a jury's discretion in mercifully recommending a life sentence. There simply was no such exercise of discretion here. *See Tucker v. Zant*, 724 F.2d 882, 891-92 (11th Cir.1984); *Westbrook v. Zant, supra*, 704 F.2d at 1502-03. Since the instruction was adequate, the failure of the petitioner's attorney to object did not deprive him of effective assistance of counsel.

Fifth, the attorney's failure to object to a jury instruction which listed aggravating factors not supported by any evidence did not prejudice the outcome of the petitioner's sentencing proceeding. The trial court enumerated all aggravating factors set forth in Florida's capital punishment statute. The petitioner claims this may have caused the jury to conclude that factors not supported by the evidence in fact existed. This claim is without merit. The jury is presumed to have followed the trial court's express instructions that each aggravating factor found and relied upon in recommending the death penalty be proved beyond a reasonable doubt and that only the evidence presented at the sentencing hearing be considered. The simple assertion that the court's listing of aggravating factors not supported by the evidence made these factors *appear* to be present and thus misled the jury into concluding that they were indeed present fails to overcome this strong presumption. Since the instruction itself did not result in prejudice, the attorney's failure to object did not constitute ineffective assistance.

Finally, the attorney's failure to object to an instruction which omitted the statement that a tie vote among jurors would mandate a recommendation of life imprisonment did not prejudice the outcome of the sentencing proceeding. A similar claim was rejected by this Court in *Henry v. Wainwright*, 743 F.2d 761, 763 (11th Cir. 1984), because the defendant could not show that the jury was ever equally divided. Likewise, the petitioner here has not established that the jury was in fact split six-to-six. Bound by precedent, we hold that the instruction did not alter the outcome of the petitioner's sentencing proceeding and therefore no prejudice resulted from the attorney's failure to object.

The denial of petitioner's petition for writ of habeas corpus is AFFIRMED.

Jack Howard POTTS,
Petitioner-Appellee,
Cross-Appellant,

v.

Ralph KEMP, Warden, Georgia Diagnostic and Classification Center,
Respondent-Appellant, Cross-Appellee.

No. 83-8087.

United States Court of Appeals,
Eleventh Circuit.

June 21, 1985.

Petitioner whose conviction of aggravated assault, kidnapping with bodily injury, and armed robbery had been affirmed, 241 Ga. 67, 243 S.E.2d 510, appealed from an order of the United States District Court for the Northern District of Georgia, 492 F.Supp. 326, dismissing his federal habeas petitions. The Court of Appeals, 638 F.2d 727, affirmed in part, and vacated and remanded in part, and denied rehearing, 642 F.2d 1210. The District Court, Charles A. Moye, Jr., Chief Judge, 575 F.Supp. 374, granted relief. On appeal, the Court of Appeals, 734 F.2d 526, affirmed. On State's petition for rehearing, the Court of

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUG 13 1985
SPENCER D MERCER
CLERK

No. 84-3646

AUBREY DENNIS ADAMS,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT and JIM SMITH,

Respondents-Appellees.

- - - - - - - - - - - - -

Appeal from the United States District Court for the
Middle District of Florida

- - - - - - - - - - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion June 17, 1985, 11 Cir., 198_; ____F.2d____).
(August 13, 1985)

Before RONEY, FAY and JOHNSON, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

REEC-6
(Rev. 6/82)

CHAPTER 782

HOMICIDE

782.02 Justifiable use of deadly force.
782.03 Excusable homicide.
782.04 Murder.
782.07 Manslaughter.
782.071 Vehicular homicide.
782.08 Assisting self-murder.
782.09 Killing of unborn child by injury to mother.
782.11 Unnecessary killing to prevent unlawful act.

782.02 Justifiable use of deadly force.—The use of deadly force is justifiable when a person is resisting any attempt to murder such person or to commit any felony upon him or upon or in any dwelling house in which such person shall be.

History.—ss. 4, 5, ch. 1637, 1868; RS 2378; ch. 4967, 1901; s. 1, ch. 4964, 1901; GS 3203; RGS 5033; CGL 7128; s. 66, ch. 74-383; s. 1, ch. 75-24; s. 43, ch. 75-298.

782.03 Excusable homicide.—Homicide is excusable when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution, and without any unlawful intent, or by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner.

History.—s. 6, ch. 1637, 1868; RS 2379; GS 3204; RGS 5034; CGL 7126; s. 1, ch. 75-13.

782.04 Murder.—

(1)(a) The unlawful killing of a human being:

1. When perpetrated from a premeditated design to effect the death of the person killed or any human being; or

2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any:

a. Trafficking offense prohibited by s. 893.135(1),
b. Arson,
c. Sexual battery,
d. Robbery,
e. Burglary,
f. Kidnapping,
g. Escape,
h. Aircraft piracy, or
i. Unlawful throwing, placing, or discharging of a destructive device or bomb; or

3. Which resulted from the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user,

is murder in the first degree and constitutes a capital felony, punishable as provided in s. 775.082.

(b) In all cases under this section, the procedure set forth in s. 921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, is murder in the second degree and constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

(3) When a person is killed in the perpetration of, or in the attempt to perpetrate, any:

(a) Trafficking offense prohibited by s. 893.135(1),
(b) Arson,
(c) Sexual battery,
(d) Robbery,
(e) Burglary,
(f) Kidnapping,
(g) Escape,
(h) Aircraft piracy, or
(i) Unlawful throwing, placing, or discharging of a destructive device or bomb

by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony is guilty of murder in the second degree, which constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) The unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than any:

(a) Trafficking offense prohibited by s. 893.135(1),
(b) Arson,
(c) Sexual battery,
(d) Robbery,
(e) Burglary,
(f) Kidnapping,
(g) Escape,
(h) Aircraft piracy,
(i) Unlawful throwing, placing, or discharging of a destructive device or bomb, or
(j) Unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user,

is murder in the third degree and constitutes a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

History.—s. 2, ch. 1637, 1868; RS 2380; GS 3205; RGS 5035; s. 1, ch. 8470, 1921; CGL 7127; s. 1, ch. 28023, 1953; s. 712, ch. 71-136; s. 2, ch. 72-724; s. 14, ch. 74-383; s. 6, ch. 75-298; s. 1, ch. 75-141; s. 250, ch. 79-400; s. 1, ch. 82-4; s. 1, ch. 83-48.

cf.—s. 316.656 Mandatory adjudication; prohibition against plea to lesser included offense.
s. 732.802 Killer not entitled to receive property or other benefits by reason of victim's death.
s. 903.133 Bail pending review; prohibited for certain first-degree felony convictions.

782.07 Manslaughter.—The killing of a human

CHAPTER 787

KIDNAPPING; FALSE IMPRISONMENT; CUSTODY OFFENSES

787.01 Kidnapping.
787.02 False imprisonment.
787.03 Interference with custody.
787.04 Felony to remove children from state or to conceal children contrary to court order.

787.01 Kidnapping.—

(1)(a) "Kidnapping" means forcibly, secretly, or by threat confining, abducting, or imprisoning another person against his will and without lawful authority, with intent to:

1. Hold for ransom or reward or as a shield or hostage.

2. Commit or facilitate commission of any felony.

3. Inflict bodily harm upon or to terrorize the victim or another person.

4. Interfere with the performance of any governmental or political function.

(b) Confinement of a child under the age of 13 is against his will within the meaning of subsection (1) if such confinement is without the consent of his parent or legal guardian.

(2) Whoever kidnaps a person is guilty of a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

History.—s. 1, ch. 5807, 1909; RGS 5088; CGL 7160; s. 1, ch. 18063, 1933; s. 784, ch. 71-136; s. 4, ch. 72-724; s. 22, ch. 74-383; s. 12, ch. 75-298; s. 1, ch. 77-174.

Note.—Former s. 805.02.

cf.—s. 903.133 (bail pending review; prohibited for certain first-degree felony convictions).

787.02 False imprisonment.—

(1)(a) "False imprisonment" means forcibly, by threat, or secretly confining, abducting, imprisoning, or restraining another person without lawful authority and against his will with any purpose other than those referred to in s. 787.01.

(b) Confinement of a child under the age of 13 is against his will within the meaning of this section if such confinement is without the consent of his parent or legal guardian.

(2) Whoever commits the offense of false imprisonment shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

History.—s. 43, sub-ch. 2, ch. 1637, 1868; RS 2399; GS 3225; RGS 5087; CGL 7159; s. 783, ch. 71-136; s. 23, ch. 74-383; s. 13, ch. 75-298.

Note.—Former s. 805.01.

787.03 Interference with custody.—

(1) Whoever, without lawful authority, knowingly or recklessly takes or entices any child 17 years of age or under or any incompetent person from the custody of his parent, guardian, or other lawful custodian commits the offense of interference with custody and shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) It is a defense that:

(a) The defendant reasonably believes that his action was necessary to preserve the child or the incompetent person from danger to his welfare.

(b) The child or incompetent person was taken away at his own instigation without enticement and without purpose to commit a criminal offense with or against the child or incompetent person.

(3) Proof that a child was 17 years of age or under creates the presumption that the defendant knew the child's age or acted in reckless disregard thereof.

History.—s. 24, ch. 74-383; s. 14, ch. 75-298; s. 1, ch. 77-174.

787.04 Felony to remove children from state or to conceal children contrary to court order.—

(1) It is unlawful for any person, in violation of a court order, to lead, take, entice, or remove a child beyond the limits of this state, or to conceal the location of a child, with personal knowledge of the order.

(2) It is unlawful for any person, with criminal intent, to lead, take, entice, or remove a child beyond the limits of this state, or to conceal the location of a child, during the pendency of any action or proceeding affecting custody of the child, after having received notice as required by law of the pendency of the action or proceeding, without the permission of the court in which the action or proceeding is pending.

(3) It is unlawful for any person, who has carried beyond the limits of this state any child whose custody is involved in any action or proceeding pending in this state, pursuant to the order of the court in which the action or proceeding is pending, or pursuant to the permission of the court, thereafter, to fail to produce the child in the court or deliver the child to the person designated by the court.

(4) Any person convicted of a violation of this law shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

History.—s. 1, ch. 21604, 1955; s. 1, ch. 57-227; s. 47, ch. 67-254; s. 785, ch. 71-136; s. 25, ch. 74-383; s. 15, ch. 75-298; s. 1, ch. 80-102.

Note.—Former ss. 6, 141, 805.03.

921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.—The court shall allow reasonable fees to the physicians appointed to examine a defendant who has alleged her pregnancy as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 256, ch. 19654, 1939; CGL 1940 Supp. 8863(387); s. 122, ch. 79-330.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 27a, ch. 19654, 1939; CGL 1940 Supp. 8863(248); s. 119, ch. 70-339; s. 1, ch. 72-72; s. 9, ch. 72-724; s. 1, ch. 74-379; s. 248, ch. 77-104; s. 1, ch. 77-174; s. 1, ch. 79-353; s. 177, ch. 83-216.

Note.—Former s. 919.23.

921.143 Appearance of victim to make statement at sentencing hearing; submission of written statement.—

(1) At the sentencing hearing, and prior to the imposition of sentence upon any defendant who has pleaded guilty or nolo contendere to any crime, the sentencing court shall permit the victim of the crime for which the defendant is being sentenced to:

(a) Appear before the sentencing court for the purpose of making a statement under oath for the record; or

(b) Submit a written statement under oath to the office of the state attorney, which shall be filed with the sentencing court.

(2) The state attorney or any assistant state attorney shall advise all victims that statements, whether oral or written, shall relate solely to the facts of the case and the extent of any injuries, financial losses, and loss of earnings directly resulting from the crime for which the defendant is being sentenced.

(3) The court may refuse to accept a negotiated plea and order the defendant to stand trial.

History.—ss. 9, 10, ch. 78-274.

921.15 Stay of execution of sentence to fine; bond and proceedings.—

(1) When a defendant is sentenced to pay a fine, he shall have the right to give bail for payment of the fine and the costs of prosecution. The bond shall be executed by the defendant and two sureties approved by the sheriff or the officer charged with execution of the judgment.

(2) The bond shall be made payable in 90 days to the Governor and his successors in office.

(3) If the bond is not paid at the expiration of 90 days, the sheriff or the officer charged with execution of the judgment shall indorse the default on the bond and file it with the clerk of the court in which the judgment was rendered. The clerk shall issue an execution as if there had been a judgment at law on the bond, and the same proceedings shall be followed as in other executions. After default of the bond, the convicted person may be proceeded against as if bond had not been given.

History.—s. 28(a), ch. 19534, 1939; CGL 8428, 8477; CGL 1940 Supp. 8863(27)(a); s. 122, ch. 70-339.

921.16 When sentences to be concurrent and when consecutive.—

(1) A defendant convicted of two or more offenses charged in the same indictment, information, or affidavit or in consolidated indictments, informations, or affidavits shall serve the sentences of imprisonment concurrently unless the court directs that two or more of the sentences be served consecutively. Sentences of imprisonment for offenses not charged in the same indictment, information, or affidavit shall be served consecutively unless the court directs that two or more of the sentences be served concurrently.

(2) A county court or circuit court of this state may direct that the sentence imposed by such court be served concurrently with a sentence imposed by a court of another state or of the United States. In such case, the Department of Corrections may designate the correctional institution of the other jurisdiction as the place for reception and confinement of such person and may also designate the place in Florida for reception and confinement of such person in the event that confinement in the other jurisdiction terminates before the expiration of the Florida sentence. Upon imposing such a sentence, the court shall notify the Florida Parole and Probation Commission as to the jurisdiction in which the sentence is to be served. Any prisoner so released to another jurisdiction shall be eligible for consideration for parole by the Florida Parole and Probation Commission pursuant to the provisions of chapter 947, except that the commission shall determine the presumptive parole release date and the effective parole release date by requesting such person's file from the receiving jurisdiction. Upon receiving such records, the commission shall determine these release dates based on the relevant information in that file and shall give credit toward reduction of the Florida sentence for gain-time granted by the jurisdiction where the inmate is serving the sentence. The Parole and Probation Commission may concur with the parole release decision of the jurisdiction granting parole and accepting supervision.

History.—s. 28(c), ch. 19654, 1939; CGL 1940 Supp. 8863(27)(c); s. 124, ch. 70-339; s. 1, ch. 78-210; s. 34, ch. 79-3; s. 12, ch. 79-42; s. 1, ch. 79-310.

921.161 Sentence not to run until imposed; credit for county jail time after sentence; certificate of sheriff.—

(1) A sentence of imprisonment shall not begin to run before the date it is imposed, but the court imposing a sentence shall allow a defendant credit for all of the time he spent in the county jail before sentence. The credit must be for a specified period of time and shall be provided for in the sentence.

(2) In addition to other credits, a person sentenced to imprisonment in custody of the Department of Corrections shall receive credit on his sentence for all time spent between sentencing and being placed in custody of the department. When delivering a prisoner to the department, the sheriff shall certify to it in writing:

(a) The date the sentence was imposed and the date the prisoner was delivered to the department.

(b) The dates of any periods after sentence the prisoner was at liberty on bond.

(c) The dates and reasons for any other times the prisoner was at liberty after sentence.

The certificate shall be prima facie evidence of the facts certified.

History.—s. 1, ch. 63-457; ss. 19, 33, ch. 69-106; s. 122, ch. 70-339; s. 1, ch. 70-441; s. 1, ch. 73-71; s. 14, ch. 77-120; s. 23, ch. 79-3.